TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1925

No. 106

GREAT NORTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED APRIL 9, 1925

No. 107

GREAT NORTHERN RAILWAY COMPANY,
APPELLANT,

vs.

THE STATE OF MINNESOTA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED APRIL 9, 1925

(33,350, 33,351)

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[fol. 1]

IN DISTRICT COURT OF RAMSEY COUNTY

STATE OF MINNESOTA, Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT

The State of Minnesota for its complaint against the defendant in the above entitled action alleges:

I

That during all of the times herein mentioned, the defendant has been and now is a corporation created, organized and existing under the laws of the State of Min- [fol. 2] nesota, and that during all of said times it owned and operated certain lines of railway within the State of Minnesota as a Railroad Company in the usual manner as a common carrier of freight and passengers.

II

That during each of the years 1901 to 1912, inclusive, the defendant failed and neglected to furnish to the State of Minnesota a true, just and complete return of all of the defendant's gross earnings as a Railroad Company operating a railway as a common carrier within Minnesota, as provided by law, for purposes of taxation in that it failed and neglected to report or arbitrarily deducted from its gross earnings before reporting the same, the sum of thirteen million four hundred forty-eight thousand seven hundred three dollars and sixty-two cents ($13,448,703.62), which the defendant claimed to have paid to the Allouez Bay Dock Company, and its predecessors, for the handling of ore shipments at Superior, Wisconsin; and that by reason of said deductions, the defendant during all of said years under reported its earnings to the extent of said aggregate amount and thereby deprived the State of Minne-

sota of taxes upon the property of the defendant measured by the statutory percentage of said earnings. That a full and detailed statement by years of said deductions and the taxes due said state by years, computed upon said deductions, is fully set forth in Exhibit "A" hereto attached and hereby made a part hereof.

[fol. 3] III

That the defendant during all of said time operated a certain line of railway from the iron mining region in St. Louis and Itasca counties in said state, and running from said mines in a southeasterly direction, to certain ore docks in the City of Superior, Wisconsin. That in the transporting of iron ore as freight on said line from said mines to said docks, the proportion of the mileage of said business within the State of Minnesota to the entire mileage over which such business was done was 81.55%; that the published tariffs of the defendant from and including 1901 to December 26, 1911, was eighty cents (80¢) per gross ton and that after said last mentioned date to and including all of the year 1912, said tariff was sixty cents (60¢) per gross ton. That during all of the time herein mentioned, said ore was transported upon a local tariff, issued solely by the defendant, and which tariff provided that said foregoing rates included weighing, sorting, docking and delivery to vessel at said dock. That the defendant during all of said time had an arrangement or agreement with a corporation that had been organized under the Laws of the State of Wisconsin by the officers and employees of the defendant as an affiliated and subsidiary company of the defendant, which company was known as the Allouez Bay Dock Company, and which at no time was organized or doing business as a common carrier either in the State of Wisconsin or elsewhere. That the purposes of said Wisconsin cor-[fol. 4] poration, for which it was chartered by said state, were as follows: The construction, purchase, lease, ownership and management of docks, piers, basins, ware houses and elevators; and for the purpose of acquiring real estate adjacent thereto and useful and necessary in connection with the ownership, operation and management of docks, piers, basins, warehouses and elevators. That the amount

so alleged by the defendant to be paid to said Dock Company in connection with the handling of said ore shipments on said docks was the arbitrary amount of one-fourth (¼) of the local freight rate collected by the defendant under said local tariffs for which local tariff rate the defendant itself agreed to deliver said ore into the vessels at said dock.

That the total payments made said Dock Company by the defendant during all of said years aggregated sixteen million four hundred ninety-one thousand three hundred fifty-nine dollars and forty-three cents ($16,491.359.43), which was one-fourth of all of the earnings of the defendant from said ore shipments during said years. That said total payments are shown by years in the second column of said Exhibit "A"; and that before prorating said earnings from ore shipments in proportion to the Minnesota mileage, namely, 81.55% of the entire mileage traveled by said shipments, the defendant deducted said entire arbitrary payments to said Dock Company, thereby reducing the actual freight earnings within Minnesota the amounts set forth in column three (3) of said Exhibit "A," or the aggregate [fol. 5] amount of thirteen million four hundred forty-eight thousand seven hundred three dollars and sixty-two cents ($13,448,703.62). That because of said arbitrary deductions the gross earnings of the defendant reported for taxation purposes were actually thirteen million four hundred forty-eight thousand seven hundred three dollars and sixty-two cents ($13,448,703.62) greater than the amounts so reported and that the earnings for each of said years were underreported by the defendant the amounts set forth in the third column in said Exhibit "A."

That the State is entitled to a tax equal to three per cent (3%) of said unreported earnings from the years 1901 to 1904, inclusive; and four per cent (4%) on said unreported earnings for the years 1905 to 1912, inclusive,—which taxes are extended and shown in the last column of said Exhibit "A".

IV

That such payments, if any, were made to said Dock Company, if for any consideration, for services rendered by said Dock Company, which services were merely incidental to

such transportation of ore by defendant and constituted an operating expense of defendant.

V

That each and all of the amounts of omitted earnings or arbitrarily reduced earnings to the extent of such reduc- [fol. 6] tions were earnings of the defendant as a railroad company in the operation of its railroad within the State of Minnesota. That after the discovery and reporting of said omitted earnings by the Public Examiner of said State, as required by law, which report was made on or about August 30, 1913, the Minnesota Tax Commission certified a statement of such errors and omissions to the Auditor of the State of Minnesota, fixing the amount of the tax computed thereon at $510,859.22, together with a penalty thereon of $25,542.96, making a total tax and penalty of five hundred thirty-six thousand four hundred two dollars and eighteen cents ($536,402.18), and interest thereon at the rate of one per cent (1%) per month from April 23, 1913, until paid; and the State Auditor on the 2nd day of September, 1913, made a draft upon the defendant for the full amount of said taxes, penalties and interest, namely, for the sum of five hundred thirty-six thousand four hundred two dollars and eighteen cents ($536,402.18); and placed said draft in the hands of the State Treasurer for collection. That the State Treasurer on September 4, 1913, duly notified the defendant of said claim of the State and of said draft, and demanded payment thereof. That said draft has not been paid, nor has any part thereof, and that none of the taxes herein mentioned have been paid.

Wherefore, plaintiff demands judgment against defendant for the sum of five hundred thirty-six thousand four [fol. 7] hundred two dollars and eighteen cents ($536,-402.18), with interest thereon at the rate of one per cent (1%) per month from April 23, 1913, until paid, as by law provided, together with the costs and disbursements of this action.

Lyndon A. Smith, Attorney General. William J. Stevenson, Assistant Attorney General.

[fol. 8] EXHIBIT "A" TO COMPLAINT

Statement showing the total payments of Allouez Bay Dock Company, and its predecessor in interest, and also showing the amounts deducted from Minnesota Revenue by the defendant because of such payments before reporting gross earnings for taxation purposes; also showing the statutory rate of such taxes and the amount of taxes claimed to be due for each of the years 1901 to 1912, inclusive

Year	Total payments to dock company	Deducted from Minnesota revenue (81.55%)	Rate	Taxes due, amount
1901	$232,088.58	$189,268.24	3%	$5,678.05
1902	1,046,417.02	853,353.08	"	25,600.59
1903	999,928.89	815,442.01	"	24,463.26
1904	1,043,321.17	850,828.41	"	25,524.85
1905	1,280,321.84	1,044,102.46	4%	41,764.10
1906	1,522,272.93	1,241,413.57	"	49,656.54
1907	1,857,318.26	1,514,643.04	"	60,585.72
1908	890,888.96	726,519.95	"	29,060.80
1909	1,521,079.51	1,240,440.34	"	49,617.61
1910	1,856,005.28	1,513,572.31	"	60,542.89
1911	2,154,196.55	1,756,747.27	"	70,269.89
1912	2,087,520.46	1,702,372.94	"	68,094.92
	$16,491,359.43	$13,448,703.62		$510,859.22

[fol. 9] IN DISTRICT COURT OF RAMSEY COUNTY

AMENDED ANSWER

Defendant answering the complaint herein:

I

Admits its corporate existence as alleged.

II

Denies that during each or any of the years 1901 to 1912, inclusive, defendant failed or neglected to furnish to the State of Minnesota a true, just and complete return of all defendant's gross earnings, as provided by law, for purposes of taxation, whether as alleged in paragraph II of the complaint, or otherwise, or at all, and denies that it arbitrarily made any deductions from its gross earnings for each or any of said years otherwise than as provided by the laws of Minnesota; denies that during all or any of

said years it under-reported its earnings to the extent of $13,448,703.62, or any other amount, whether as alleged in said paragraph or otherwise; denies that it paid out of its gross earnings the said amount of $13,448,703.62, or any other amount, to the Allouez Bay Dock Company, or its predecessor, the Duluth Superior & Western Terminal Company; denies that the amounts set forth in Exhibit "A", aggregating $13,448,703.62 were paid by this defendant during the years specified; denies that it operated any [fol. 10] of the lines of railway referred to in the complaint engaged in the transportation of iron ore, during the year 1901, or at any time prior to May 1, 1902, and denies that it earned or received any part of the gross earnings for transportation of iron ore during said period or any part thereof; and alleges that all that portion of the amounts set forth in Exhibit "A" paid subsequent to May 1, 1902, was paid by this defendant to the Duluth Superior & Western Terminal Company and the Allouez Bay Dock Company as and for their respective proportions of the entire transportation charges, for their services in the transportation and handling of iron ore in the State of Wisconsin.

III

Denies all the allegations of paragraph III of the complaint, except that it admits that the ratio of the mileage of the iron ore business within the State of Minnesota to the entire mileage over which such business was done was substantially 81.55 per cent; admits that the Allouez Bay Dock Company was and is a Wisconsin corporation, and that the purposes for which it was chartered were substantially as alleged in paragraph III of the complaint, but alleges that during all the time in question said Dock Company was a common carrier and a railroad within the meaning of that term and the statutes of Wisconsin, and subject to the jurisdiction of the Interstate Commerce Commission; admits that the proportion of the total freight rate collected in [fol. 11] the first instance by defendant and paid to the Allouez Bay Dock Company and its predecessor, the Duluth Superior & Western Terminal Company, was twenty-five cents (25¢) per ton from May 1, 1902, to July 31, 1909, inclusive, twenty-two cents (22¢) per ton from August 1,

1909, to December 25, 1911, inclusive, and fifteen cents (15¢) per ton from December 26, 1911, to December 31, 1912, inclusive; and defendant alleges that said amounts and proportions were paid to the Allouez Bay Dock Company and its predecessor, the Duluth Superior & Western Terminal Company, as and for their respective shares of said freight rate, for their services in the transportation and handling of said iron ore; and admits that the total amount paid by this defendant and said Eastern Railway Company of Minnesota to said Dock Company and its said predecessor, the Duluth Superior & Western Terminal Company, during all of the years mentioned in paragraph III, was the sum of $16,491,359.43; the same being shown by years in the second column of said Exhibit "A".

IV

Denies all the allegations of paragraph IV and alleges that all payments made by the defendant to said Dock Company and the Duluth Superior & Western Terminal Company were made as and for their lawful and proper proportions of the entire freight rate, based upon their services in connection with the transportation and handling of said iron ore.

[fol. 12]

V

Admits that the Public Examiner of Minnesota pretended to discover as omitted earnings the items and amounts referred to in the complaint, and reported the same to the Tax Commission, and that said Commission certified a statement of those matters to the State Auditor and attempted to fix the amount of tax computed thereon at $510,859.22, together with a pretended penalty thereon of $25,542.96, and interest thereon at the rate of 1% per month; admits that the State Auditor, on September 2, 1913, made a draft upon defendant for the total of those amounts, and admits that defendant refused to pay said draft or any part thereof.

VI

Further answering defendant alleges that, as required by law, defendant and its proprietary companies reported,

for and during each of the years 1901 to 1912, inclusive, its and their gross earnings within the State of Minnesota; that upon the gross earnings so reported the State of Minnesota assessed and levied against defendant and said companies taxes which were duly paid in amounts as follows, to each year respectively:

[fol. 13] Taxes Paid State of Minnesota by Great Northern System

Year	1901	$446,116 42
	1902	599,334 20
	1903	562,333 63
	1904	545,504 57
	1905	799,007 48
	1906	872,096 66
	1907	933,195 10
	1908	799,502 58
	1909	865,843 03
	1910	938,337 94
	1911	982,789 91
	1912	1,165,021 29
	Total	$9,509,082 81

That the amount of taxes so paid for the said years, respectively, as above stated, was equal to, if not greater than, the average property tax levied upon all property in Minnesota other than railroad property; that if defendant be required to pay any further or additional taxes for or on account of said years, or any one of them, it and its property within the State of Minnesota will be subjected to a higher rate of taxation, in proportion to the value of said property, than was assessed and leview upon property other than railroad property, and paid by the owners thereof; that the property of defendant within the State of Minnesota is devoted to the transportation of interstate commerce; that the attempt of the State of Minnesota to exact of defendant, for the years aforesaid, a greater tax, in pro- [fol. 14] portion to the value of its property so devoted to interstate commerce, than was levied upon and collected from property other than railroad property, was and is unlawful and in contravention of the provisions of the con-

stitution of the State of Minnesota, Section 7, Article I, and the constitution of the United States, and particularly Section 8, Article I, and Section 1, Article 14 thereof; that the laws of the State of Minnesota, under and by virtue of which a gross earnings tax is imposed, or attempted to be imposed, upon defendant, are invalid and in contravention of the provisions of the constitution of the United States aforesaid in that (a) said laws attempt to impose a tax upon, and thus burden, interstate commerce; (b) said laws attempt to impose a tax upon property without the State of Minnesota and thus deny to defendant due process of law; (c) said laws attempt to impose a higher tax upon defendant, in proportion to the value of its property, than is imposed upon other property and the owners thereof, and hence deny to defendant the equal protection of the law.

VII

Further answering, defendant alleges that the laws of Minnesota impose upon railroad companies a tax based upon their gross earnings within the state, which is in lieu of all other taxes and is in effect a substitute property tax; that said laws are invalid if thereby an attempt is made to subject railroad property devoted to the transportation of interstate commerce to a higher rate of taxation [fol. 15] than is levied upon other property within the state, and are further invalid if thereby and therethrough a tax is in effect imposed upon the property of a railroad located without the state.

Defendant alleges that during the years from May 1, 1902, to 1912, inclusive, it was the owner of certain lines of railway devoted to the transportation of ore from the Mesabi Range in St. Louis and Itasca Counties, Minnesota, to a connection with the railway and terminal properties of the Allouez Bay Dock Company and its predecessor, the Duluth Superior & Western Terminal Company; that defendant and the said Allouez Bay Dock Company and Duluth Superior & Western Terminal Company received, for the transportation of ore from the mines on the Mesabi Range aforesaid to the docks of the Allouez Bay Dock Company and its predecessor, the Duluth Superior & Western Terminal Company, and the delivery of said ore to vessels,

the sum of eighty cents (80¢) a ton from May 1, 1902, to December 25, 1911, and sixty cents (60¢) a ton from December 26, 1911, to and including all of the year 1912; that the revenue thus derived from the transportation of ore was divided between defendant and the Allouez Bay Dock Company and Duluth Superior & Western Terminal Company, for said several years, as follows:

[fol. 16]

	G. N. Ry. Co.	Allouez Bay Dock Co. and Duluth, Superior & Western Terminal Co.
May 1, 1902, to July 31, 1909, inclusive	55¢	25¢
Aug. 1, 1909, to Dec. 25, 1911, inclusive	58¢	22¢
Dec. 26, 1911 to Dec. 31, 1912, inclusive	45¢	15¢

that the ratio of the earnings thus secured by defendant from the transportation of ore, to the total revenue derived by defendant and the Allouez Bay Dock Company and its predecessor, the Duluth, Superior & Western Terminal Company, is substantially equal to the ratio of the value of defendant's property devoted to the transportation of ore to the aggregate value of defendant's property and the property of the Allouez Bay Dock Company and its predecessor, the Duluth, Superior & Western Terminal Company, devoted to the transportation of ore; that the value of the lines of defendant located within the State of Minnesota, devoted to the transportation of ore, bears substantially the same ratio to the total value of the lines of defendant devoted to the transportation of ore that the mileage of said lines within the state bears to the total mileage of said lines so devoted by defendant to the ore traffic; that the proportion of the total earnings derived from the transportation of ore by defendant, the Allouez Bay Dock Company and Duluth, Superior & Western Terminal Company, [fol. 17] allowed to the Allouez Bay Dock Company and Duluth Superior & Western Terminal Company, as hereinbefore stated, is no greater than the proportion which the value of the properties of said Allouez Bay Dock Company and its predecessor, the Duluth Superior & Western Ter-

minal Company, bears to the total value of the property devoted to the transportation of ore; that the ratio of the value of the property employed in the transportation of ore located within the State of Wisconsin, to the total value of all the property devoted to the transportation of ore from the Mesabi Range, as aforesaid, is very much greater than is the ratio of the mileage of the lines within the State of Wisconsin, over which the said ore is transported, to the total mileage of the lines of railway employed in said transportation; that a division of the total gross earnings accruing to defendant and the Allouez Bay Dock Company and Duluth Superior & Western Terminal Company from the transportation of ore, between the State of Minnesota and the State of Wisconsin, in proportion to the mileage which said ore is transported within the state to the total mileage transported, without first deducting that proportion of said gross earnings accruing to the Allouez Bay Dock Company and Duluth Superior & Western Terminal Company, would give to the State of Minnesota a very much greater proportion of said earnings than the proportion which the value of the lines devoted to the traffic within the State of [fol. 18] Minnesota bears to the total value of all the lines devoted to said traffic; that such a division as last mentioned, as between said states, for the purpose of assessing a gross earnings tax within the State of Minnesota, would be unfair, unjust and unlawful, and would in effect subject property located without the State of Minnesota to taxation within the State of Minnesota; that the attempt to apply the Minnesota laws imposing a gross earnings tax upon the earnings of defendant from the transportation of ore, in the manner set forth in the complaint herein, renders said laws invalid and in contravention of the provisions of the constitution of the State of Minnesota and of Article 14 of the amendments to the United States Constitution and Paragraph 8 of Article I thereof. Defendant alleges that during each of the years aforesaid it paid all taxes lawfully levied and assessed upon its railway lines located within the State of Minnesota, including the lines devoted to the transportation of iron ore; that the rate of taxation per dollar of value paid by defendant to the State of Minnesota during each of said years upon its said property was as

high as, if not higher than, the average rate of taxation levied upon all other property within the State of Minnesota.

[fol. 19] VIII

Except as hereinbefore admitted defendant denies each and every allegation of the complaint.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein.

E. C. Lindley, M. L. Countryman, Attorneys for Defendant, 1120 Great Northern Bldg., St. Paul, Minnesota.

In District Court of Ramsey County

Amended Reply

I

Plaintiff for its amended reply to the amended answer of the defendant in the above entitled action denies each and every allegation, matter and thing in said amended answer contained, except as heretofore alleged in plaintiff's complaint and admitted in said amended answer or as hereinafter admitted.

II

Plaintiff admits that the taxes paid by the defendant to the state of Minnesota during the years 1901 to 1912, inclusive, are the respective amounts alleged in paragraph [fol. 20] six (6) of defendant's answer as having been so paid.

Wherefore, plaintiff demands judgment as prayed for in the complaint herein.

Clifford L. Hilton, Attorney General; Egbert S. Oakley, Deputy Attorney General; Patrick J. Ryan, Attorneys for Plaintiff.

IN DISTRICT COURT OF RAMSEY COUNTY

Settled Case

CAPTION

This case came on for trial before Hon. Hugo O. Hanft, J., without a jury, on the morning of Tuesday, December 6, 1921, Patrick J. Ryan and E. S. Oakley appeared on behalf of plaintiff, and E. C. Lindley and M. L. Countryman on behalf of defendant.

Mr. Ryan: Plaintiff offers in evidence Plff's. Ex. A, may it please the Court, the original assessment of omitted earnings covered by this case, made by the Public Examiner and the Tax Commission.

Received without objection.

GEORGE R. MARTIN, sworn on behalf of plaintiff, for cross-examination under the statute, testified:

By Mr. Ryan:

Q. Mr. Martin, how long have you been with the Great Northern?

[fol. 21] A. Since July, 1890.

Q. You have held, as I recall, just about every position that a man could hold with the railway corporation?

A. Well, I have held positions in the operating and accounting and executive departments.

Q. At present what is your position?

A. Vice president, executive department.

Q. And how long have you held that position?

A. Since March 1, 1920.

Q. And prior to that time what was your position?

A. Vice president and comptroller.

Q. Now, in your capacity as vice president and comptroller you have had for a long time custody of the various records of the Great Northern Railway Company and its affiliated corporations, have you not?

A. As far as it related to accounting matters, yes, sir.

Q. You are familiar with the Allouez Dock, the dock at Allouez Bay, near Superior, Wisconsin, are you not?

A. Yes, sir.

Q. And you are familiar with the railway lines of the Great Northern Company known as its ore lines, are you not?

A. Yes, sir.

Q. Approximately what is the mileage of the railway line in Minnesota devoted to the hauling of iron ore?

A. About eighty miles.

[fol. 22] Q. That is main line haul?

A. Main line mileage, yes, sir.

Q. And approximately what was the mileage of the Great Northern from the state line in Wisconsin to the docks at Allouez?

A. A little over twenty miles; about twenty miles.

Q. And you are acquainted, either from personal information or from knowledge of the records of the Great Northern, with the Allouez dock and its ownership, are you not?

A. Yes, sir.

Q. Do you know about when the docks at Allouez Bay were built?

A. I can give the exact dates from my record. The first dock was one which was constructed by the Duluth & Winnipeg Terminal Company and which came to the Duluth, Superior & Western Terminal Company through the foreclosure of the property of the Duluth & Winnipeg Terminal Company. That dock is not now in existence, having been torn down to make way for another dock in the same locality. There are four docks, numbered 1, 2, 3 and 4. The present No. 1 dock, as I said, is not the original dock. Dock No. 2 was constructed about 1901 and 1902, in two parts; the first part one year and the next part, I think, the next year. Dock No. 3 was constructed in two parts; the first part was in 1902 and 1903, and the extension in 1905 and 1906. The new Dock No. 1 was constructed in 1906 and 1907, and Dock No. 4 in 1910 and 1911; the two years in [fol. 23] each case being due to the fact that that sort of work was done in the winter, starting in the fall of one year, after the ore season was over, and being completed in the spring before the new ore season started.

Q. Originally, though, and prior to 1901 there was one dock, and that dock was in use in at least as early as the ore-shipping season of 1900, was it not?

A. Yes, sir.

Q. Now, you say that that dock was originally owned by what company?

A. Duluth & Winnipeg Terminal Company.

Q. And it was acquired as of what date by the Duluth, Superior & Western Terminal Company?

A. In 1897.

Q. Do you know whether or not the Great Northern or the Eastern Railway Company of Minnesota owned the stock of the Terminal Company in 1897?

A. Which Terminal Company are you speaking of?

Q. Duluth, Superior & Western Terminal Company.

A. It did not organize that company, and it did not own the stock until in June—I think it was in June—1897.

Q. Which company acquired the stock of the Terminal Company in June, 1897?

A. That should be June, 1898, or thereabouts, instead of 1897. The stock was taken up on the books of the Lake Superior Company, Limited,—the original subscription of [fol. 24] the stock, taken up on the books of the Lake Superior Company, Limited.

Q. Was all of the stock of that company that was outstanding acquired at that time?

A. No, sir; these were later issues at different dates.

Q. You said there were later issues?

A. Later issues of stock at later dates.

Q. But my question was whether or not the Lake Superior Company, Limited, in 1898, acquired all of the stock that was issued and outstanding.

A. At that time, yes, sir.

Q. Later the Terminal Company, the Duluth Superior & Western Terminal Company, increased its stock?

A. Yes, sir.

Q. And from time to time as the stock was increased it was issued to the Lake Superior Company, Limited?

A. Yes, sir.

Q. And then from 1898 and continuously thereafter until what date did the Lake Superior Company, Limited, own the stock of the Terminal Company?

A. That stock was delivered to the Great Northern Railway Company in March, 1912.

Q. The stock was transferred to the Great Northern in March, 1912?

A. Yes, sir.

Q. That was all of the stock of the Duluth, Superior & Western Terminal Company?

A. Yes, sir.

[fol. 25] Q. Now, in 1900 what company operated the Allouez dock?

A. The Duluth, Superior & Western Terminal Company.

Q. And until what date thereafter did the Duluth, Superior & Western Terminal Company operate the dock?

A. Until June 1, 1903.

Q. From June 1, 1903, what company operated the dock?

A. The Allouez Bay Dock Company.

Q. By whom was the Allouez Bay Dock Company organized?

A. J. A. Murphy, Heber McHugh and D. M. Filben were the first directors.

Q. To whom was its stock issued?

A. Lake Superior Company, Limited.

Q. Was all of it issued to the Lake Superior Company Limited?

A. Yes, sir.

Q. I mean substantially all of it. There were some voting shares issued, were there not?

A. Directors' qualifying shares in the hands of directors, but the subscription was made by the Lake Superior Company, Limited.

Q. And those qualifying shares were held by the individuals, Murphy, McHugh and Filben, as Great Northern employes, and for the use and benefit of the Lake Superior Company, Limited, were they not?

A. I should say so.

Q. Now, you say after 1903 and after the organization [fol. 26] of this Allouez Bay Dock Company, the Allouez Bay Dock Company instead of the Duluth, Superior & Western Terminal Company operated the dock?

A. Yes, sir.

Q. What arrangement was made between the Duluth, Superior & Western Terminal Company and the Allouez Bay Dock Company generally?

A. The Duluth, Superior & Western Terminal Company leased its property from what was called the Omaha Crossing at Allouez to the end of the docks, including all the dock property, to the Allouez Bay Dock Company.

Q. And how long did that lease continue in force?

A. Until August 1, 1908.

Q. On August 1, 1908, a new lease was made, was it not?

A. No, sir.

Q. What occurred on August 1, 1908?

A. The Duluth, Superior & Western Terminal Company sold that property, which had been under lease, to the Allouez Bay Dock Company.

Q. Now beginning with the ore-shipping season of 1900, when the Duluth, Superior & Western Terminal Company operated the dock, was the dock operated in connection with any railway company?

A. In connection with the Eastern Railway Company of Minnesota.

Q. What, generally, was the nature of the arrangement [fol. 27]between the Duluth, Superior & Western Terminal Company and the Eastern Railway Company of Minnesota?

A. The Eastern Railway Company of Minnesota originated the ore shipments on the Missabe Range and brought them down over its own line to Saunders, Wisconsin, which was the point of connection with the Duluth, Superior & Western Terminal Company of its line leading to the lake front, to the docks. The ore in the ore cars, after reaching Saunders, was moved in those same cars to and on to the docks under an arrangement whereby not only the cars, but the locomotives of the Eastern Company handled the shipments.

Q. Was there a written agreement entered into between the Eastern Railway Company of Minnesota and the Duluth, Superior & Western Terminal Company?

A. I haven't been able to find any written agreement, but the arrangement was one which is shown by the records.

Q. Well, now, that, briefly, will cover 1900. Now, in 1901 was there any different arrangement between the Duluth, Superior & Western Railway Company and the Eastern Railway Company of Minnesota?

A. No, sir.

Q. How about 1902?

A. On May 1, 1902, the Eastern Minnesota Railway Company leased its lines of railway to the Great Northern Railway Company, and the Eastern Minnesota thereafter did not operate, but the Great Northern did.

[fol. 28] Q. Thereafter, from May 1, 1902, to the date of the lease which you have mentioned between the Allouez Bay Dock Company and the Great Northern—was July 1st or August 1, 1903, was it?

A. June 1, 1903, yes.

Q. Between May 1, 1902, and June 1, 1903, was there any written instrument expressing the arrangement between the Great Northern and the Duluth, Superior & Western Terminal Company?

A. No; I haven't been able to find any written agreement.

Q. Do you know whether or not the arrangement which had previously existed between the Eastern Railway of Minnesota and the Duluth, Superior & Western Terminal Company continued in effect as to the Great Northern?

A. Up until June 1, 1903, yes, sir.

Mr. Countryman: The question was whether you knew whether it did or not; do you answer that you know or that it did prevail?

Witness: It did prevail.

Mr. Countryman: Yes.

Witness: Yes.

Q. Now, on the 1st of January, 1901, what was the relationship, if any, between the Great Northern Railway Company and the Eastern Railway Company of Minnesota?

A. The Great Northern Railway Company owned the entire capital stock of the Eastern Railway Company of Minnesota.

Q. And the Great Northern after January 1, 1901, con-[fol. 29] tinued to own the entire capital stock of the Eastern Railway Company of Minnesota, did it not?

A. Yes, sir.

Q. Still own it?

A. No; the stock was surrendered when the property of the Eastern Minnesota was sold to the Great Northern Railway on July 1, 1907.

Q. Now, do you know who constituted the board of directosr of the Eastern Railway Company of Minnesota on January 1, 1901?

A. I haven't the record here; I don't know independently.

Q. Did you know whether or not they were identical with the board of directors of the Great Northern Railway Company?

A. I couldn't say.

Q. Well, you do know, do you not, Mr. Martin, that on January 1, 1901, and continuously thereafter the Eastern Railway Company of Minnesota, whose stock was owned by the Great Northern Railway Company, was operated in the interests of the Great Northern Railway Company?

A. I don't know as I would want to say that exactly; it had its own board of directors—I don't know who they were now; it was an independent operating company.

Q. It maintained a formal, separate corporate existence, and formally, at least, or through this organization which it maintained, operated the railway line?

Mr. Lindley: If your Honor please, it seems to me the [fol. 30] witness should state exactly what took place, and then it would be a question for the Court of whether it was mere form or not a mere form.

The Court: That is correct.

Q. Can you tell us whether or not the officers were the same officers? The principal officers of the Great Northern were also the principal officers of the Eastern Railway Company of Minnesota?

A. I can't tell from memory, but I think probably they were not.

The Court: Can you have the information at 2 o'clock?

Witness: I can get that, yes, sir. That date was of January 1, 1901, wasn't it, that you——

Mr. Ryan: Yes, January 1, 1901; but bear in mind, Mr. Martin, I only ask that because we want the officers continuously thereafter, if that is material. I suppose only 1901 and 1902, that is all you claim, isn't it?

Mr. Lindley: The Eastern did not operate after 1902.

Q. Now, do you know who constituted the board of directors of the Duluth, Superior & Western Terminal Company on January 1, 1901?

A. The board of directors of the Duluth, Superior & Western Terminal Company, elected October 3, 1900, and holding during, that year were D. M. Philbin, J. A. Murphy, J. H. Gruber, R. I. Farrington, E. Sawyer; the officers were D. M. Filbin, president; J. A. Murphy, vice president; R. I. [fol. 31] Farrington, auditor; E. Sawyer, treasurer; J. H. Gruber, secretary.

Q. Now, on January 1, 1901, what was Mr. Philbin's connection with the Great Northern Railway Company, if you know?

A. I am not sure at that particular date, but his general position for a great many years, and probably at that time, was general superintendent.

Q. General superintendent?

A. General superintendent on the Eastern Railway of Minnesota.

Q. I take it that you mean that during 1901 and until May 1, 1902, he was general superintendent of the Eastern Railway Company of Minnesota, and thereafter general superintendent of the Great Northern?

A. Yes, sir; but on that date that you mention I think he was not an officer of the Great Northern Railway Company at all.

Q. Now, what, on January 1, 1901, was the connection of Mr. Murphy with either the Great Northern or the Eastern Railway of Minnesota?

A. He was the attorney for the Eastern Railway Company of Minnesota at Superior, Wisconsin.

Q. Was he not the same time attorney for the Great Northern?

A. I think not.

Q. On January 1, 1901, until May 1, 1902, he was attorney for the Eastern Railway Company of Minnesota for Wisconsin, and thereafter he was attorney for Wisconsin for the Great Northern, was he not?

[fol. 32] A. Yes, sir.

Q. On January 1, 1901, what was Mr. Gruber's position with the Great Northern or the Eastern Railway Company of Minnesota?

A. I think he was not connected with the railway company at all.

Q. With either the Eastern or the Great Northern?

A. Neither one of the railway companies.

Q. Did he subsequently become connected with either railway company?

A. His duties were principally in connection with the iron ore properties; I couldn't say exactly at a particular date what he was doing, but he was throughout his employment a Great Northern Iron Ore Property man.

Q. Well, then, may not this be true, that on January 1, 1901, Mr. Gruber was an employe of the Lake Superior Company, Limited, or one of the corporations the stock of which it owned?

A. I think that was probably so.

Q. By the way, do you know whether or not Mr. Philbin or Mr. Murphy were connected with the Lake Superior Company, Limited, in any way, or, directly or indirectly, with the Iron Ore Properties, on January 1, 1901?

A. They were Railway Company men and not Iron Ore Property men, excepting that Mr. Philbin was an iron ore expert and had more or less to do with the development of the iron ore lands.

Q. Now, as to Mr. Farrington; on January 1, 1901, what was his connection with either of these railway companies [fol. 33] or the Lake Superior Company, Limited, or the ore companies or properties?

A. Mr. Farrington was a railway company man in charge of accounting. I think his title was comptroller at that time, and probably he was comptroller of both the Great Northern and the Eastern Railway Company of Minnesota.

Q. Now, Mr. Sawyer; on January 1, 1901, what was his——

A. Mr. Sawyer was secretary and treasurer of the railway companies, I would say probably both of them at that time; that was his general connection with the different properties of the Great Northern Railway Company and its subsidiaries.

Q. Now, did Mr. Farrington and Mr. Sawyer, after May 1, 1902, continue to hold the positions which you have de-

scribed with the Great Northern, say from May 1, 1902, continuously thereafter until January 1, 1913?

A. They continued for quite a good many years; I think January, 1913, was probably about the date of the discontinuance of both of them in the railway service.

Q. And they held during that period the positions which you have described?

A. Yes.

Q. Now, the Allouez Bay Dock Company, you say, was organized in 1903, and you have named the first board of directors; that was Murphy, McHugh and Philbin?

A. Yes, sir.

Q. After 1903, when the Allouez Bay Dock Company op- [fol. 34] erated this property, Mr. Murphy, who was a director, continued to be a director until approximately January 1, 1913, did he?

A. Mr. Murphy seems to have left the board at the annual election in October, 1907—No, that isn't right. He continued on the board each year, including the annual election of October, 1912.

Q. And, as you testified, he continued thereafter to be the general attorney of the Great Northern for the state of Wisconsin?

A. He was attorney for the Great Northern at Superior, Wisconsin.

Q. Now, as to McHugh; at the date of the organization of the Allouez Bay Dock Company what position, if any, did McHugh hold with the Great Northern or with the Lake Superior Company, Limited?

A. No position with either one of those companies; he was an Eastern Railway Company of Minnesota man at that time, and assistant attorney in Mr. Murphy's office.

Q. How long did he remain on the Board?

A. He seems to have left the Board in August, 1907.

Q. How long did Mr. Philbin continue on that Board?

A. Until July, 1908.

Q. Do you know who succeeded Mr. McHugh on the Board?

A. J. H. Gruber.

Q. And how long did he continue to hold the office of director?

[fol. 35] A. Until June, 1913.

Q. Now, during that period, from 1908 to 1913, what was Gruber's connection with the Great Northern or any of its connected companies?

A. I think he was not connected with the Great Northern; he was then with the Iron Ore properties. He, I think, might possibly have been kept as the land agent of the Great Northern handling certain lands in northern Minnesota. If so, that was merely an incidental duty that was given to him for convenience.

Q. Well, being with the Great Northern Ore Properties, then, would you not say that he was connected with or employed by the Lake Superior Company, Limited?

A. No. That was after the date of the trust as of December 7, 1906, and the Iron Ore Properties were entirely independent from that date.

Q. Then after that date he would have been employed by the Great Northern Ore Trustees?

A. Yes, sir.

Q. Now, who succeeded Mr. Philbin on the Board?

A. L. W. Hill.

Q. Louis W. Hill; and did he continue on the Board until January 1, 1913, or afterwards?

A. Until June, 1913, the same date as all the others.

Q. And Louis W. Hill during all the period that he was on the board of directors of the Allouez Bay Dock Company was an officer and director of the Great Northern Railway Company, was he not?

[fol. 36] A. He was connected with the Great Northern, had some official position during that time, and I think probably he was on the Board, although I can't say definitely for that whole period of time.

Q. Were these men whom you have named as directors of the Allouez Bay Dock Company also the officers of that company?

A. There were different officers at different periods, and some of the time at least the officers were the same as the directors. For instance, at the time of organization, as I stated, Mr. Philbin was a director and was also the president of the Dock Company, Mr. Murphy was a director and also the secretary of the Dock Company. There were some changes in officers down through the years.

Q. There were some men who held office during subsequent years who did not during the time serving hold the office of director; is that correct?

A. Will you repeat that?

Q. Was there at any time up to 1913 a person holding any office in that corporation who was not a director in the corporation?

A. Yes; the first list of officers contained the name of Mr. Sawyer, treasurer, who was not a director, and there are other officers down through the list in the same way.

Q. Will you state the names of the persons who during that period were at any time officers of the Allouez Bay Dock Company?

A. The first list of officers, in 1903, was D. M. Philbin, president; J. A. Murphy, secretary; E. Sawyer, treas-[fol. 37] urer; J. C. Morrell, superintendent. Those officers seem to have continued down to July, 1908, when Mr. L. W. Hill became president, J. H. Gruber secretary and assistant treasurer, D. M. Philbin general manager, John G. Drew auditor.

Mr. Lindley: Did Morrell continue?

Witness: Yes; yes, Morrell continued throughout the period as superintendent.

Q. How long did Drew continue to be auditor?

A. Until some time in 1911.

Q. Now, what, if any, was Mr. Drew's connection with the Great Northern or any of its affiliated companies?

A. During the time of his employment with the Great Northern he was either assistant comptroller or comptroller.

Q. And from 1908 to 1911, while he was auditor of the Allouez Bay Dock Company, he was either assistant comptroller or comptroller of the Great Northern?

A. Yes, sir.

Q. Now, what other officers held positions with the Allouez Bay Dock Company who have not so far been mentioned?

A. Well, when Mr. Drew went away from St. Paul I was elected auditor in his place and continued, either as auditor or assistant auditor, until after the annual meeting of October, 1913. That is the last record I have. In 1912, while

I was assistant auditor, F. S. Dalrymple was auditor and he continued in that capacity for 1912 and 1913. After Mr. [fol. 38] Sawyer retired from business, Mr. L. E. Katzenbach was the assistant treasurer of the Allouez Bay Dock Company, from February, 1912, down to and including the annual meeting of October, 1913. I believe that mentions all the names of the different ones who held official positions with the Allouez Bay Dock Company.

Q. Now, Mr. Martin, while you held the office which you have mentioned in the Allouez Bay Dock Company, what position did you hold with the Great Northern Railway Company?

A. Comptroller.

Q. And you held that during all the time that you held the other office?

A. Yes, sir.

Q. During the time that Mr. Dalrymple held an office in the Allouez Bay Dock Company, what office did he hold with the Great Northern Railway Company?

A. He was a Great Northern Iron Ore property employe and not connected with the Railway Company.

Q. Mr. Katzenbach, during the time that he held his position with the Allouez Bay Dock Company, what position, if any, did he hold with the Great Northern Railway Company?

A. Upon Mr. Sawyer's retirement he was his successor as secretary and treasurer, or part of the time perhaps his title was assistant treasurer, of the Great Northern Railway Company.

Q. When was the Lake Superior Company, Limited, organized, if you know?

[fol. 39] A. I couldn't say the date of that organization from anything I have here.

Mr. Lindley: Well, it was about 1899.

Witness: Somewhere along in there, I should think, yes; I don't recall the exact date. I haven't anything here that would show that.

Q. That is sufficient for our purposes; it was about 1899. Are you familiar with the articles of association of the Lake Superior Company, Limited?

A. I have no doubt seen them a good many times.

Mr. Ryan: At this time I offer Plff's. Ex. B, being the articles of association of the Lake Superior Company, Limited. I understand that counsel have no objection to this copy being offered, subject to verification as to its accuracy, and subject to the objection as to its materiality.

Mr. Countryman: No objection of any kind, Mr. Ryan.

The Court: It may be received.

Q. Now, Mr. Martin, the Lake Superior Company, Limited, was organized by Mr. Hill—James J. Hill, Mr. James N. Hill and Mr. Farrington at the instance and direction of the Board of Directors of the Great Northern Railway Company, was it not?

A. I should say so.

Q. And it was organized for the purpose of taking and receiving from the Great Northern Railway Company and holding for the Great Northern Railway Company certain [fol. 40] property, certain stocks in corporations, which property and which corporations consisted of iron ore properties—the corporations principally were the owners of iron ore properties, were they not?

Mr. Lindley: Well, if you can answer that of your own knowledge. (Pause.)

Q. Well, that isn't particularly important anyhow. Are you familiar with the agreement of October 20, 1899, between the Great Northern Railway Company and the Lake Superior Company, Limited, by which certain stocks and bonds were transferred to the Lake Superior Company, Limited, and the Lake Superior Company, Limited, undertook to hold and deal with those stocks and bonds in the manner prescribed by the Board of Directors of the Great Northern Railway Company, a copy of which I show you?

A. I have seen this before a good many times.

Mr. Ryan: Subject to verification and subject to the objection as to its materiality—with those exceptions that it is a true and correct copy of the original contract, all objection is waived by counsel, I offer in evidence Plff's. Ex. C.

The Court: It may be received.

Mr. Ryan: I now offer in evidence Plff's. Ex. D in connection with Mr. Martin's testimony, under the same con-

ditions that other offers have been made, being copies of the articles of incorporation of the Allouez Boy Dock Company.

The Court: It may be received.

Q. Now, Mr. Martin, you are and have been familiar with this dock or docks themselves covering this period [fol. 41] from 1901 to 1912, have you not?

A. Yes, sir.

Q. And you have been familiar with the railway lines leading from the mines to the dock?

A. Yes, sir.

Q. During the year 1900 ore was hauled over what are substantially the present Great Northern ore lines to this dock, was it not?

A. Yes, substantially so. There was quite an important change of line between Saunders and t-e St. Louis river, but the effect was just the same whether we hauled over the old line or over the new line.

Q. Well, and in 1901 iron ore was hauled from the mines in northern Minnesota over the same right-of-way tracks to the docks—Allouez—as it is today?

A. Excepting for that rather substantial change of line between Saunders and the St. Louis river.

Q. Now, in 1901 was there any tariff in existence under which ore moved over these ore lines to the Allouez docks?

A. I couldn't say whether there was a regular printed tariff of that date or not.

Q. What is the first printed tariff that you have now?

A. I couldn't say the date of it. There was at some date a printed tariff, but I don't recall the date that it was issued.

Mr. Ryan: Plff's Exs. E to I, inclusive, being tariffs for the hauling of iron ore from various mines in Minnesota to Allouez——

[fol. 42] Mr. Lindley: Covering what period?

Mr. Ryan: Beginning with Ex. E, effective August 6, 1906, and Ex. I, dated as effective December 26, 1911. I take it that these may be introduced in evidence subject to the same limitations as the exhibits already offered.

Mr. Lindley: Subject to their verification, we have no

objection to their substituting copies for the original tariffs.

The Court: They may be received.

Q. Now, Mr. Martin, from the introduction of these exhibits that we have just covered it develops that there was a tariff in 1906 at least; you know nothing of any tariffs prior to that time?

A. Now, I couldn't say what dates the tariffs were, as far as formal printed tariffs are concerned, nor when the first one was issued. I don't know whether this was the first one or not. That is shown here as the earliest date.

Mr. Ryan: I think we may assume that is the first tariff.

Mr. Lindley: I think that is so; I can't admit that.

Q. Well, if we assume that the tariff that we have here is the first tariff printed and published, what might have been the situation and what could have been the situation in respect to the rate, price, at which ore was moved prior to 1906?

Mr. Lindley: I assume, Mr. Ryan—you say, "if this is the first printed and published"—and filed with the Interstate Commerce Commission; it might have been printed and published and not filed prior to 1906.

[fol. 43] Q. What I am trying to get at is simply this: we have tariffs bearing the first date some time in 1906, and want to know under what terms and conditions ore was moved beginning with January 1, 1901, and up until the time of the filing of a printed tariff.

A. The rate of 80 cents per gross ton was in effect during the years that you mention, just the same as it was during the later years, if that is what you mean.

Q. That is it. And how was that rate announced? How did a shipper of ore know in 1901 what he was going to be charged for moving his ore to the boat?

A. I couldn't say exactly how he would know it. They, of course, did know, and knew what they had to pay.

Q. How was the ore handled by the Railroad Company, whether it was Eastern Railway Company of Minnesota or the Great Northern Railway Company, in respect to the movement of cars from the mines to the boat?

A. The loaded ore cars were taken at the place of loading by the Railway Company with its locomotives in the railway cars and moved over the railway line to Saunders, Wisconsin, which in 1901 and part of 1902 was an operation of the Eastern Railway Company of Minnesota. From Saunders east to and including the docks the operation was of the Duluth, Superior & Western Terminal Company, performed by having the engines and cars of the Eastern Rail- [fol. 44] way Company go through to the dock, placing the ore cars upon the docks ready for unloading. The engine service, that is, wages of the engineers and firemen, cost of fuel and other expenses, was primarily carried by the Eastern Minnesota, because it was their locomotives and cars and their engine crews that handled the trains, but the cost of that service east of Saunders was billed against the Duluth, Superior & Western Terminal Company. The train crews of the Eastern Railway Company of Minnesota left the train at Saunders, and the switching crews, switching foreman and switching men took the trains from Saunders on to the dock, and those men were employes direct of the Duluth, Superior and Western Terminal Company, paid upon the payrolls of that company. The maintenance of the property east of Saunders was done by the Terminal Company, and paid for, as far as the labor was concerned, upon its own payrolls, and the material was paid for upon vouchers of the Duluth, Superior & Western Terminal Company.

Q. Now, that arrangement continued until what time?

A. That continued in that way until June 1, 1903.

Q. As I recall your testimony, you don't know whether or not there was any written agreement expressing that arrangement between those various companies up until 1903?

A. I haven't been able to find any written document.

[fol. 45] Q. In 1903 the arrangement for compensation as between the companies was expressed in writing, was it not?

A. Yes, sir, there was a contract made between the Allouez Bay Dock Company and the Great Northern Railway Company as of June 1, 1903.

Q. And there was a contract between the Terminal Company and the Allouez Bay Dock Company, was there not?

A. The Allouez Bay Dock Company at that time leased

the docks of the Terminal Company and thereafter operated them.

Q. Have you in your files a copy of that lease, Mr. Martin?

A. Yes, I have a copy of the lease here. This is a copy of the lease of June 1, 1903.

Q. I mean the lease from the Terminal Company to the Dock Company.

A. No, I haven't any copy of that lease here.

Q. That lease is in existence, however, and a copy of it can be procured, can it not?

A. I think so, yes, sir.

Q. This lease which you hand me is a copy of the lease from the Allouez Bay Dock Company to the Great Northern?

A. No, it is an operating lease between the Allouez Bay Dock Company and the Great Northern Railway Company for the operation of the dock.

Mr. Ryan: I now offer in evidence Plff's. Ex. J., being a copy of the agreement made the 1st day of June, 1903, between the Great Northern Company and the Allouez Bay Dock Company.

[fol. 46] The Court: It may be received.

Q. Now, Mr. Martin, that agreement was followed by a somewhat similar agreement called a lease, dated August 1, 1909, was it not?

A. There was an agreement dated November 30, 1908, which, however, simply covered the termination of the other lease, and then there was an agreement dated August 1, 1909.

Q. May I have a copy?

A. Yes, sir. (Paper produced by witness.)

Mr. Ryan: We now offer in evidence Plff's Ex. K, being an indenture made this first day of August, 1909, between the Allouez Bay Dock Company and the Great Northern Railway Company.

Received without objection.

Q. Did this last agreement referred to, dated August 1, 1909, continue in effect until 1913?

A. Yes, sir, with a modification prior to that time as to the rate, when the rate was changed from 80 cents to 60 cents.

Q. Now, I understand the situation, the Great Northern deducted from its gross earnings as it reported them for taxation the amounts specified in these two agreements.

Mr. Lindley: I object to the assumption that they were the gross earnings of the Great Northern.

Mr. Ryan: Well, I don't mean to include that assumption. I should have said these pretended payments on these pretended contracts.

The Court: That is the question the Court has to pass on.

[fol. 47] Q. The deductions are based upon these contracts and agreements from 1903 to January 1, 1913?

A. The division of the rate was made in accordance with the agreement.

Q. Yes. And then in 1913 the Dock Company directly conveyed the dock properties to the Great Northern Company?

A. Yes, sir.

Q. And the Great Northern Company has since January 1, 1913, operated the tracks and the dock as a part of its railway?

A. Yes, sir.

Q. And since January 1, 1913, it has not deducted, has it, from its earnings reported for taxation any sums on account of the operation of that dock?

Objected to as immaterial and too remote from the period in controversy.

The Court: Sustained upon the first ground.

Q. Now, just what is the general nature of this dock? What does the property—the dock proper—actually consist of? What we want in the record, if you can put it there, Mr. Martin, is just as complete a description of that dock, the property itself, the dock itself, the tracks leading up to it, as you may give.

The Court: Have you a blue-print of it there?

Witness: No, sir, I have not.

The Court: If you have a picture, just bring a picture. I think that will settle it a whole lot better.

Recess until 2 P. M.

[fol. 48] Q. I suppose, Mr. Martin, before going on with the description of those docks you might give us the names of the officers of the Eastern Railway Company of Minnesota during the years 1901 and 1902.

A. For 1901 the directors of the Eastern Railway Company of Minnesota were Louis W. Hill, Samuel Hill, E. Sawyer, M. D. Grover, and R. I. Farrington. For 1902 the directors were Louis W. Hill, D. M. Filben, Samuel Hill and M. D. Grover and R. I. Farrington. 1901 the officers were as follows: President, Louis W. Hill; first vice president, R. I. Farrington; second vice president, D. M. Filben; secretary and treasurer, E. Sawyer; general solicitor, M. D. Grover; attorney, J. A. Murphy; comptroller, R. I. Farrington; assistant comptroller, J. G. Drew; general auditor, J. L. Cramer; chief engineer, John F. Stevens; superintendent, D. M. Filben; superintendent of telegraph, E. J. Little; traffic manager, J. C. Eden; general passenger agent, F. I. Whitney; assistant general passenger agent, C. E. Stone; general ticket agent, F. I. Whitney; and assistant general ticket agent, C. E. Stone; general baggage agent, S. A. Smart. In 1902 the officers were: President, Louis W. Hill; vice president, D. M. Filben; secretary and treasurer, E. Sawyer; general solicitor, M. D. Grover; comptroller, John G. Drew; chief engineer, John F. Stevens.

Q. Now, in 1901 what if any was Mr. Louis W. Hill's connection with the Great Northern?

[fol. 49] A. He had no connection with the Great Northern in 1901.

Q. Did he prior to 1901 have any connection with the Great Northern?

A. Yes, he had been connected with the Great Northern in various capacities.

Q. Do you know when last prior to 1901 he had been connected with the Great Northern?

A. No, I didn't look up the history further than this.

Q. Can you tell us whether or not he left the Great Northern to go to the Eastern Railway of Minnesota?

A. Yes, he did.

Q. L. W. Hill, of course, is the son of James J. Hill, and is president of the present board of directors of the Great Northern, is he not?

A. Chairman of the board of directors of the Great Northern now, yes, sir.

Q. And the son of James J. Hill?

A. The son of James J. Hill.

Q. In 1901 or 1902 did Samuel Hill have any connection with the Great Northern?

A. In 1901 and 1902 Samuel Hill was on the board of directors of the Great Northern.

Q. Did he hold any other position that you recall?

A. No.

Q. Mr. Sawyer, I understand you have already testified, was during 1901 and 1902 connected with the Great Northern; I may be mistaken in that. Was he or was he not [fol. 50] connected with the Great Northern in 1901 and 1902?

A. He was connected with the Great Northern as secretary and treasurer.

Q. Mr. Grover, was he connected with the Great Northern in 1901 or 1902?

A. He was on the board of directors of the Great Northern both years, and was the general solicitor of the Great Northern both years.

Q. What was Mr. Farrington's connection with the Great Northern in 1901 and 1902?

A. Mr. Farrington was on the board of directors in both years, and in 1901 was comptroller and in 1902 second vice president of the Great Northern.

Q. There were five directors, were there?

A. Yes, five directors.

Q. Mr. Filben was an officer of the Eastern Railway Company of Minnesota in 1901 and 1902; was he an officer also of the Great Northern during that period?

A. No. I think he was not connected with the Great Northern at that time.

Q. Had he been previously connected with the Great Northern?

A. No, his service was with the Eastern Minnesota Company prior to that time, and I think was exclusive Eastern Minnesota service.

Q. Did he subsequently go to the Great Northern?

A. Yes, he was general superintendent of the Great Northern at a later date.

[fol. 51] Q. Mr. Murphy was an officer of the Eastern Minnesota at that time; was he also an officer of the Great Northern?

A. No, Eastern Minnesota exclusively.

Q. Were any of the other officers whom you have named during 1901 and 1902 officers of the Great Northern?

A. Yes, Mr. Drew was the comptroller of both companies in 1902; Mr. Stevens was the chief engineer of both companies in 1901 and 1902. The other officers named in 1901 were connected with the Great Northern, excepting that I think Mr. Eden, as traffic manager, was exclusively an Eastern Minnesota employe.

Q. Did all of those officers hold in the Great Northern the position carrying the same title in the Eastern Minnesota?

A. Yes.

Q. When was the operation of the Great Northern and Eastern Minnesota Company merged?

A. I don't believe that you could say that they were ever merged.

Q. Well, a change in the form of relations at least occurred, did it not, some time in 1902?

A. Yes, on May 1, 1902, the lines of the Eastern Railway Company of Minnesota were leased to the Great Northern Railway, and the operation of those lines was thereafter Great Northern Railway operation.

Q. And the Eastern Railway of Minnesota maintained thereafter, however, its identity as a separate existing corporation, did it?

[fol. 52] A. Yes, sir.

Q. Until what date?

A. I think its corporate existence—It is still in existence as a corporation.

Q. Does it still have officers?

A. Yes.

Q. Has there ever been any change other than that one of May 1, 1902, by which the Great Northern leased the lines of the Eastern Railway Company?

A. Yes, on July 1, 1907, the Great Northern Railway Company purchased the lines of the Eastern Railway Company of Minnesota.

Q. What were the terms of that purchase in respect to this: What provision did the Great Northern make for taking care of the outstanding obligations of the Eastern Railway Company of Minnesota?

Mr. Countryman: We want to note an objection to that question upon the ground it is immaterial and doesn't bear on any of the issues involved in this case. I don't understand counsel's purpose in asking it, and I want to make my objection to it.

Objection overruled. Exception by defendant.

A. The Great Northern Railway Company assumed and agreed to pay any and all indebtedness and liabilities of the Eastern Railway Company of Minnesota existing at the date of the sale of the property, which was July 1, 1907.

Q. That agreement was in writing?

A. Yes, sir. I am reading from the deed of the Eastern [fol. 53] Minnesota to the Great Northern for the property. The exact words, "and assumes and agrees to pay any and all indebtedness and liabilities of the party of the first part existing at the date hereof." That is, the party of the first part was the Eastern Railway Company, and the second party assuming that was the Great Northern Railway Company.

Mr. Countryman: Have you given the date of that conveyance?

Witness: July 1, 1907.

Mr. Ryan: I suppose possibly we ought to offer that deed in evidence.

Witness: This is the original document I have here.

The Court: Have you a copy of it here?

Witness: I haven't a copy of it here; we could make one.

Mr. Ryan: Plaintiff will offer in evidence the deed from which the provision has just been read, and will supply a copy of it for the record later, if counsel will permit that.

Mr. Countryman: Copy of the deed?

Mr. Ryan: Yes.

Mr. Countryman: Yes. Well, of course, it will all go in under the objection we have already made to its materiality.

The Court: Yes.

Mr. Ryan: That will be Ex. L.

The Court: It may be received over objection.

Q. Now, Mr. Martin, all through the history of the Great [fol. 54] Northern it has been the policy, has it not, of the Great Northern to extend and develop its lines by organizing or causing to be organized corporations, which corporations would build, in their own names, railway lines, with a view to the ultimate taking over of those railway lines by the Great Northern in exchange for the stock originally issued by such corporation?

Mr. Lindley: Objection to the question, if the Court please, calling for a conclusion as to the policy rather than for a statement of fact as to what was done.

The Court: I shall sustain the objection to the word "policy." If you ask it as a fact, why go ahead.

Mr. Ryan: If we have to ask about each particular corporation, each particular construction (that is ascertaining the fact) and go through, that will take considerable time.

Mr. Lindley: Well, if it be important to counsel's case, then we want the facts. If counsel wants to show that various companies were organized from day to day and year to year and what became of those companies and how much they operated and how they reported with respect to taxes, we would be perfectly willing that he go ahead and show the facts, but we——

The Court: I shall sustain the objection.

Q. From whom, Mr. Martin, did the Great Northern acquire the stock of the Eastern Railway Company of Minnesota?

A. I would think, without being absolutely sure of the procedure, that the Great Northern probably subscribed [fol. 55] for that stock when it was ready to issue, offered for sale.

Q. Was it the fact that the Eastern Railway Company of Minnesota was incorporated at the instance and direction of the board of directors and stockholders of the Great Northern?

A. Well, I couldn't say that that was so. I couldn't answer the question absolutely.

Q. Do you know whether or not the Great Northern owned all of the stock of the Eastern Railway Company of Minnesota from the inception and the organization of the corporation?

A. I think it did, but I might be mistaken, possibly, as to the ownership from the first date.

Q. You know that the Eastern Railway Company of Minnesota built a line from Hinckley to Superior, do you not?

A. Yes, sir.

Q. And at that time did the Great Northern Company own a line from St. Paul or Minneapolis to Hinckley?

A. No, the Great Northern did not own the line at that time.

Q. What company at that time owned the line from Minneapolis to Hinckley?

A. The St. Paul, Minneapolis & Manitoba owned the railway line by which you would get from Minneapolis to Hinckley by way of St. Cloud.

Q. Did the Great Northern own the stock of the Manitoba Company?

A. No, sir.

[fol. 56] Q. Did the Manitoba Company own the stock of the Great Northern Company?

A. No, sir.

Q. At the time that the Eastern Railway Company of Minnesota was built, did the Manitoba Company own or lease the line of the Great Northern Company at that time?

A. No, sir.

Q. Was the reverse true?

A. Speaking now of the time that the Eastern was formed?

Q. Yes.

A. I think I shall have to correct my testimony, because as I made the answer I didn't have the distinction in my mind as between the Great Northern and the Manitoba Company; I should have said that the Manitoba Company had the stock of the Eastern Railway Company of Minnesota.

Q. Well, in what way was the Manitoba Company interested in the line between Minneapolis and St. Paul and Hinckley?

A. It was the owner of that line.

Q. It was the owner of the line; and the Eastern Railway Company of Minnesota was an extension, a further com-

pletion of the line from St. Paul and Minneapolis to Hinckley and thence on to the Head of the Lakes?

A. The Eastern Minnesota connected with the Manitoba lines at Hinckley and ran to Superior, in Wisconsin, yes, sir.

Q. Now, what was the relationship between the Manitoba Company and the Great Northern Company?

[fol. 57] Mr. Lindley: When?

A. No relation at that time.

Q. When did the relation develop and what was it?

A. On February 1, 1900, the Great Northern Railway Company leased the lines of the Manitoba Company.

Q. It also acquired at that time, did it not, all of the property, including all the stocks and bonds, of the Manitoba Company, except certain stocks or bonds, possibly, connected with the railway line of the Manitoba itself?

A. It acquired by lease, for operation, the Manitoba Company's lines and acquired some of the securities. I couldn't say without reference to the records what they were.

Q. It did at that time acquire from the Manitoba Company all of the stock of the Eastern Railway Company of Minnesota, did it not?

A. I would think that that was the time that the stock of the Eastern Company came to the Great Northern.

Q. Now I think, Mr. Martin, we might have our dock described.

A. This blueprint which I have shows the way in which the docks are constructed on the ground.

The Court: Have you a side view of them also?

Witness: I have not; I couldn't get them while I was down at the office, and asked them to send it up, and this is all they sent me. Perhaps I can describe it, though. The tracks start at the ground level at the Omaha Crossing at [fol. 58] Allouez, and then bear off from the approach so as to reach the four docks, and almost from the crossing the tracks begin to elevate until they reach the top of the docks, which, as I recall it, are perhaps seventy-five feet from the water. Docks 1, 2 and 3 are of timber construction, built of timber, in the shape of bents, the same as a bridge would be, and then there are pockets which are con-

structed below the deck of the dock, into which the ore drops from the open-bottom cars, and then from the pockets there are spouts which, when you are ready to load the boat, can be lowered, and the gates of the pockets open so that the ore goes by gravity from the pockets into the boat. Dock No. 4 is the same general plan, excepting that it is built of steel and concrete instead of wood, Dock No. 2 is marked on the print as having 250 pockets in the first part of it, and 100 pockets in the second. Dock No. 3 has 160 pockets in the first part of it, and 166 pockets in the second. The number of pockets in the other docks doesn't seem to be stated here, but No. 1 has more, on account of the slant of the harbor line, and No. 4 has somewhat less. Does that cover it, Mr. Ryan?

Q. Yes, but there are some details I want to ask. Assume that we were describing the docks now, Mr. Martin, as they now exist—substantially as they now exist. Speaking, now, of the general characteristic—and the questions I will ask will go to the general characteristics, and then we will take up the docks from the beginning, because some of them [fol. 59] were not in existence during the period covered by this tax. But we are speaking now only of the general characteristics. What is the distance from the Omaha Crossing to the lake end of the docks?

A. The main track mileage reports, as they are always stated in the reports for the Allouez Bay Dock Company, cover simply one track, and the distance from the Crossing to the end of the dock is ninety-two hundredths of a mile. There are a large number of tracks. Each dock has six tracks, and then there are these tracks in the approaches which merge together as they get closer to the Omaha Crossing.

Q. The Omaha Crossing marks the point at which the tracks begin to elevate so as to reach the dock at a practical grade, does it not?

A. The tracks are at grade there, and soon after going over the Crossing toward the lake the tracks begin to elevate so as to reach the top of the dock.

Q. And it may be said that those tracks beginning at the Omaha Crossing are a necessary part of the approach to the dock, essential to the docks as a dock structure?

A. Yes, sir, they are the tracks that serve to reach the dock from the yards located west of the Omaha Crossing.

Q. What I am getting at is: the docks are necessarily constructed some seventy-five feet above the water, and that being so, it is necessary to construct at a grade a cer-[fol. 60] tain amount of track to make the approach to that height?

A. That is correct.

Q. And do you know about how many tracks constitute the approach to the docks proper?

A. I believe that at the Crossing it is a double track and then spreads out from there so as to make the leads to these four docks, and as you get up toward the dock, toward the top of the dock, the tracks then spread out so as to make the total number of tracks on the deck of each dock.

Q. Now, there are and always have been some structures upon the dock, have there not?

A. Yes, there are all of the working buildings, such as the offices of the superintendent and the agent, and there is an interlocking plant.

Q. What is the interlocking plant, Mr. Martin?

A. That is a tower with levers in it which reach to the different switches, so as to throw the switches for whatever track you want to move the cars on to the dock and to whichever dock the cars may be destined.

Q. Yes, and what other structures do you recall—a telegraph office, or is that connected with the——

A. I think the telegraph office is in the building that I have mentioned as being the agent's office. My recollection is that there were something like eight different buildings there, according to the record that I have seen, but I don't recall just the name of each one of them.

[fol. 61] Q. There is a structure for heating cars loaded with ore, too, is there not?

A. Yes, there is a heating house that is used in the cold weather when the ore gets frozen in the cars and has to be heated so as—steamed and thawed, so as to unload it.

Q. In other words, in cold weather the ore can't practically be discharged from the cars without being heated?

A. A good deal of the ore that comes from the mine is moist and wet, and in the cold weather that will freeze in

the cars and it has to be steamed and thawed before it can be unloaded through the hopper bottoms of the cars.

Q. Now, I understand the process of unloading is simply this: that those ore cars with hopper bottoms are moved on to that dock, set over pockets, the hoppers opened and the ore discharged into those pockets?

A. That is the theory of it, but there is a very great deal of the ore that is hard to unload, and that means that several men will be required, with long poles, on top of the car and at the sides, so as to poke that ore until you can get a hole through and have the ore drop through the bottom of the car into the pocket.

Q. In other words, the hopper bottoms do not always release the ore?

A. Not immediately.

Q. And then men have got to be sent upon the cars to push that ore out of the cars and into the pockets?

[fol.62] A. That is correct.

Q. And the vessels stand beside those docks, and those spouts are dropped into their holds and the ore then shoots through those spouts into the vessel?

A. Yes. The ore moves first into the closed pocket and it may be some little time before a vessel comes to take the ore from a particular pocket; but when the vessel is there to take the ore, the spouts are dropped into the hold of the vessel, and the gates of the pocket are lifted and then the ore is again supposed to go by gravity from the pockets into the hold in the boat, and the same process of using pike poles with a number of men is frequently necessary in order to release the ore from the pockets.

Q. It is sometimes true that ore is loaded into pockets that are not locked, but discharge the ore from the car directly into the hold of the boat, is it not?

A. I don't think so; I think the fall would be too great; I don't believe it is done that way.

Q. Now, you say it sometimes happens that boats are not available immediately and that the ore is left for a little while in those pockets?

A. There is a very great number of varieties of grades of ore, and for a boat load the owners of the ore may require ore of certain grades, and in order to get that it may take an accumulation of some little time, several days perhaps,

so that the pockets are full of ore that doesn't move out from the pocket to the boat immediately a good deal of the [fol. 63] time; that is, a good deal of storage of ore in the pockets is necessary on account of this grading situation.

Q. But ordinarily ore is not stored in those pockets in the sense in which the word "storage" is usually used?

A. Well, it is stored a good deal. Of course, when the ore season is busy the ore is kept moving as rapidly as possible, but this situation does exist, and every one of the companies having ore shipments of different grades finds it necessary at times to use some storage.

Q. Now, on January 1, 1901, how many docks existed on this Allouez Bay property?

A. For the season of 1901 there was only the old No. 1 dock in operation.

Q. The old No. 1. And in subsequent years?

A. I believe that I will have to correct that. I have the same difficulty that I had this morning with the statement. The first part of Dock No. 2 must also have been constructed at that time.

Q. And in the subsequent years?

A. In the winter of 1901 and 1902 the second portion of Dock No. 2 was constructed; in 1902 and 1903 the first part of No. 3 was constructed; in 1905 and 1906 the second part or the extension of No. 3 was constructed; in the winter of 1906 and 1907 old Dock No. 1 was torn down and new Dock No. 1 was built, which is the present No. 1; and in the winter of 1910 and 1911 Dock No. 4 was constructed.

[fol. 64] Cross-examination.

By Mr. Lindley:

Q. Mr. Martin, you say you began with the Great Northern in 1890?

A. Yes, sir.

Q. At that time was the Eastern Railway Company of Minnesota in existence?

A. Yes, sir.

Q. Do you happen to know when it was organized?

A. The line was built in 1887, the organization was some short time before that.

Q. When you say the line was built in 1887 what line have you reference to?

A. The line of the Eastern Minnesota from Hickley to Superior.

Q. What other lines did the Eastern Railway Company of Minnesota build?

A. The Eastern Minnesota has the line from a station called Boylston, about three miles south of Saunders, through to Fosston, Minnesota, and the lines reaching the iron ore mines on the Missabe Range.

Q. What lines did the Eastern Railway Company of Minnesota operate in 1900?

A. All of these lines that I have described; the line from Hinckley to Superior and from Boylston to Cass Lake, Minnesota, and the spur and branches on the iron range.

Q. Had it operated the line from Hinckley to Boylston from 1887 down to 1900?

A. Yes.

[fol. 65] Q. Had it operated the other lines which you refer to from the date of their construction and from the time they had been put in operation?

A. Yes, excepting that a part of the line through to Fosston was originally the construction of the Duluth & Winnipeg.

Q. Constructed by the Duluth & Winnipeg Railroad, but had that road ever been put in operation before it was acquired by the Eastern?

A. Yes, it had been in operation.

Q. Yes, so that in 1900 the Eastern Railway Company of Minnesota, Minnesota railroad corporation, was an operating railroad operating the roads that you have designated and had been operating the same for a number of years?

A. Yes, sir.

Q. It continued to operate those roads until May, 1902, did it not?

A. Yes, sir.

Q. With what roads did these lines of the Eastern connect at Saunders or thereabouts?

A. The connection of the Eastern at Saunders was with the Duluth, Superior & Western Terminal Company.

Q. Were there yards there?

A. At one time, and probably about this time, there was a small yard consisting of, as I remember it, about three

tracks, but the main yards for the ore purposes were down near the Omaha Crossing, west of the Omaha Crossing, just before getting to the Crossing.

Q. In 1901 what properties did the Duluth, Superior & [fol. 66] Western Terminal Railway Company have or own?

A. The line from Saunders east on to the docks and to the end of the docks on the lake end.

Q. Approximately about how many miles?

A. The main track was probably seven miles.

Q. Approximately how many miles of railway was the Eastern operating in 1901?

A. Why, I don't know as I can say exactly, because I don't remember just when the lines were built on the Range, but perhaps 400 miles.

Q. And it had been operating that number of miles for a number of years?

A. Yes.

Q. Did the Eastern Railway Company from the date of its beginning of operations until 1902 report as a railroad company for the purposes of taxation in the state of Minnesota?

A. The Eastern Minnesota Railway Company made its own tax reports to the state of Minnesota.

Q. Did it make its other reports called for of public carriers?

A. All of them, yes, sir.

Q. During the whole of that period of time; it carried on its operations as a public carrier, the same as any other railroad company in the state of Minnesota?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Maintained, of course, its own properties?

A. Yes, sir.

[fol. 67] Q. Had its own payrolls?

A. Yes, sir.

Q. Its own officers?

A. Yes, sir.

Q. All of whom were paid out of its own revenues?

A. Yes, sir.

Q. Was there any distinction between the method of operation of the Eastern Railway Company down to 1902 from that of the operation of any other railroad company in the state, to your knowledge?

A. There was no difference.

Q. Throughout that period of time it was sued as any other railroad company, in these courts?

A. Yes, sir.

Q. Now, Mr. Martin, did it pay gross earnings taxes during all those years on its own gross earnings?

A. Yes, sir.

Q. And did it pay a gross earnings tax for the years 1901 and 1902?

A. It must have done so; I haven't looked at the individual reports, but certainly it did.

Q. Has it operated since it leased its property in May, 1902?

A. No, sir.

Q. Will you describe exactly the operation in the transportation of ore during the seasons 1901 and 1902.

A. The empty cars at the mines on the Iron Range were loaded with iron ore and made up into trains and trans-
[fol. 68] ported over the Eastern Railway Company's tracks to Saunders, and the Eastern Minnesota locomotives went east of Saunders through to and on the docks with their own crews. The train crews of the Eastern Minnesota left the train at Saunders, and the switching crew of the Duluth, Superior & Western Terminal Company took charge of the trains in moving them down through the yards and on to the docks. When the cars got on to the docks the Terminal Company unloaded them into the pockets, and they were then again switched back as empty cars into the yard, made up as empty trains to go back to the Range, and handled as far as Saunders by the Terminal Company's switch crew, when the Eastern Minnesota road crews took charge of the train and ran the empty cars back to the Range.

Q. That was the method of operation until May, 1902?

A. Yes.

Q. Did that operation continue thereafter until 1903?

A. Yes.

Q. When did the Duluth, Superior & Western Terminal Company cease to operate from Saunders?

A. On June 1, 1903.

Q. Who operated from May, 1902, to June, 1903, between Saunders and the docks?

A. The Duluth, Superior & Western Terminal Company, following the same plan that I have outlined, excepting that [fol. 69] it was a Great Northern operation after the Great Northern leased the Eastern Minnesota line on May 1, 1902.

Q. It was Great Northern operation down to what point?

A. Well, I mean that the Great Northern instead of the Eastern was the road which operated the trains or the engines and paid the engine crews on its payrolls, because the Eastern Minnesota had ceased to operate. But the Terminal Company still continued to pay the bill for the engine service east of Saunders and continued to pay its own switchmen on its own payrolls and the unloading of the ore on the docks and the expenses of maintaining the tracks and maintaining the docks and all of those other expenses that occurred upon that railroad line.

Q. In other words, subsequent to the lease of the Eastern lines in May, 1902, to the Great Northern, and up until June, 1903, the Great Northern operated the lines owned by the Eastern to Saunders, and the Duluth, Superior & Terminal operated the lines east of Saunders?

A. Yes.

Q. Under the same method that had obtained when the Eastern was the operating company?

A. Yes, sir.

Q. Now, what happened June 1, 1903?

A. The line of the Duluth, Superior & Western Terminal Company was leased from Saunders to the Omaha Crossing to the Great Northern Railway Company, and from the [fol. 70] Omaha Crossing east to the harbor line, including the dock, to the Allouez Bay Dock Company.

Q. Subsequent to the date of that lease the Great Northern then extended its operation from Saunders to the Omaha Crossing; is that right?

A. Yes, it extended its operation up on to the dock beginning at that date.

Q. But it had a lease of the properties to the Omaha Crossing?

A. Yes.

Q. And the Dock Company had a lease of the Terminal Company's property between the Omaha Crossing and on the water and in the water?

A. Yes.

Q. Now, from June, 1903, until I think it was August, 1908, the operation was under Plffs. Ex. J; is that right? The operating agreement dated June 3, 1903?

A. Yes, it was under the agreement dated June 1, 1903, that we had this morning, that I gave up my copy of *there*.

Q. Will you please describe what the Dock Company did in the way of handling the ore under the agreement of 1903?

A. The Dock Company unloaded the ore from the cars into the pockets and from the pockets into the boats, and maintained its tracks and dock property, buildings on the dock.

Q. Did it have its own payrolls?

A. Yes, sir.

Q. Did it hire, discharge and pay its own men?

A. Yes, sir.

[fol. 71] Q. Who was the man actually in charge of the operation of the docks during that period of time?

A. The superintendent of the docks, Mr. J. C. Morrell.

Q. Did he have charge of all the employes engaged in unloading the ore from the docks and from the docks into the vessels?

A. Yes, sir.

Q. Was he an exclusive employe of the Dock Company?

A. Yes, sir.

Q. That was so, was it not, during the whole period in controversy here, from 1901 to 1912, inclusive?

A. Yes, sir.

Q. Did the Dock Company keep a full set of accounts?

A. Yes, sir.

Q. Did it make its own reports, so far as it was required to report, to the public authorities?

A. Yes, sir.

Q. Is that also true of the Duluth, Superior & Western Terminal Railway Company prior to the time when it leased its properties to the Great Northern and the Dock Company?

A. Yes, sir.

Q. During the years 1901, 1902 and 1903 until June, did the Duluth, Superior & Western Terminal Company conduct and carry on its operations as any other public carrier by railroad?

A. Yes, sir.

The Court: Do the records show that each one of these [fol. 72] did, as a matter of fact, make their return under the gross earnings law?

Mr. Lindley: I will ask that question, if your Honor please.

Q. The Dock Company, as I understand, Mr. Martin, was a Wisconsin corporation?

A. Yes, sir.

Q. And it owned no property and carried on no operations in the state of Minnesota?

A. No, sir.

Q. Its properties were reported to and were taxed by the state of Wisconsin?

A. Yes, sir.

Q. It paid during all the period of controversy here in question, did it not, tall taxes assessed upon it by the state of Wisconsin?

A. Yes, sir.

Q. Or by the city of Superior?

A. Yes, sir.

Q. And that is likewise true of the Terminal Company?

A. Yes, sir.

Q. Did the Duluth, Superior Terminal Company own any property in Minnesota?

A. No, sir.

Q. Did it carry on any operations in Minnesota?

A. No, sir.

Q. So that both of those companies were, so far as Minnesota is concerned, foreign corporations whose operations were exclusively without the state of Minnesota?

[fol. 73] A. Entirely without the state of Minnesota, yes, sir.

Q. Will you please state where all the ore which originates on the Missabe Range and which has been carried

over the lines in question is destined to—or was destined to, rather?

A. Some ports east of the Head of the Lakes.

Q. What we call lower lake ports?

A. Lower lake ports and South Chicago; most of it to the lower lake ports, like Cleveland and Ashtabula.

Q. Was it all traffic known as interstate commerce?

A. It was interstate commerce, so-called, yes, sir.

Q. Is there any other traffic handled over the docks of the Allouez Bay Dock Company?

A. Nothing but iron ore.

Q. And nothing but interstate commerce?

A. Nothing else but this iron ore in interstate commerce.

Q. Mr. Martin, do you know about what the average haul of the ore is from the Missabe Range, the various mines on the range, to the dock?

A. It is about 107 miles.

Q. Do you know approximately how many mines ore is handled from over the Range?

A. A large number; maybe a hundred; a large number.

Q. Well, the number of mines from which ore has been handled has gradually increased, has it not, since about 1887 or 1888?

[fol. 74] A. Yes, sir.

Q. Was it about 1897 or 1898 that the Eastern began handling ore from the Missabe Range?

A. There was some ore handled before that, I would say, but the quantities were small. About 1897 would be the time that the first ore was handled by the Eastern Minnesota.

Q. Now, Mr. Martin, will you please describe what is necessary with respect to mixing and assembling the ore at the docks.

A. These various grades that I mention, perhaps a hundred in number, the different grades are made largely by mixing the ore from the different mines. A great many of the mines, on account of the low iron content, or perhaps on account of containing other minerals in excessive quantities, cannot be used in the blast furnaces as the ore comes from the mine, and it is necessary to beneficiate the ore

by putting it in a mixture with a higher grade of ore from other mines.

Q. Now, that work is usually done at the docks, isn't it?

A. Yes, I should say that it was all done there.

Q. It is the effort, is it not, of the shippers of these ores to endeavor to make a carload for a given vessel which is destined for use in certain blast furnaces?

A. Yes, sir.

Q. The different blast furnaces require different grades of ore?

A. Yes, sir.

Q. And one company may be the owner of a number of [fol. 75] blast furnaces located at different points in Ohio and Pennsylvania?

A. Yes, sir.

Q. That same company may be the owner of different mines on the Missabe Range; is that not true?

A. The owner or the operator.

Q. Yes.

A. Through lease, of a number of different mines, yes, sir.

Q. So that the ore coming from various mines on the Range has to be assembled in lots so that the cars will be together before they go up on the dock, do they not?

A. Yes, that is switched in the yard west of the Omaha Crossing.

Q. Now, will you just explain how that is handled in assembling the cars together in the yards.

A. Well, that is about all there is in handling it. The mine people give instructions to the Dock people as to how they want to have their different shipments put together, and that is done by indicating the car numbers, so that a switch list is made up and the different cars are switched into these blocks as the owners have indicated that they want the cars combined—want the cars assembled.

Q. That is, the ore trains are broken up in the yards west of the Omaha Crossing?

A. Yes, sir.

Q. And the cars are put together according to instructions given from the various owners?

[fol. 76] Yes, sir.

Q. And when put together in blocks they are then dragged up on the docks according to those blocks of cars which they want?

A. Yes, that is right.

Q. And dumped into a given set of pockets?

A. Yes, sir.

Q. And are held in those pockets until the vessel in which they are destined to be shipped arrives?

A. Yes, sir.

Q. Will you just say in a word what the burden is with respect to the assembling of ore in blocks and the mixing of it in the pockets.

A. Well, it is an expense that the Railway Company is put to by reason of the switching that is necessary in order to get the cars into the blocks, and on account of these different grades and the making up of cargoes the ore is held in pockets for different periods of time so that there is a storage which has to be furnished for the ore until the ship comes to take it away from the dock.

Q. What do you have to say with respect to thawing the ore?

A. Whenever the cold weather catches the wet ore and it freeezs in the cars—which happens somewhat in the spring but a good deal more in the fall of the year usually, it is necessary to put it into this heating house or, if there isn't room enough there, thaw it outside, which is a rather slow and expensive process.

[fol. 77] Q. Well, what is the ore thawed or heated with—steam?

A. Steam, yes.

Q. Where is that steam generated?

A. Part of the steam comes from the power plant located near the dock.

Q. East or west of the crossing?

A. The power plant, as I remember it, is east of the Crossing. A good many times there is much more ore than the thawing house will carry and more than the power plant can supply steam for, and in that case locomotives are steamed up and used for the purpose of steaming and thawing the ore.

Q. Mr. Martin, when did operations cease under the agreement Ex. J, dated June 1, 1903?

A. December 1, 1908.

Q. Was there any agreement in effect between the Dock Company and the Railway Company for the first part of the season of 1909?

A. No, there was none.

Q. During that time which company handled the ore from the yards which you have described to and on the dock?

A. The Allouez Bay Dock Company.

Q. Did it also unload from the cars into the docks and from the docks into the vessels?

A. Yes, sir.

Q. And maintained and operated its dock properties generally?

A. Yes, sir.

[fol. 78] Q. From August the 1st, 1909, until the end of the season of 1912 the operation was under Plff's. Ex. K; is that right?

A. It was under the agreement of August 1, 1909.

The Court: That is K.

Witness: Yes, sir.

Q. Under that agreement did the Dock Company perform substantially the same services with respect to unloading the ore and taking care of its docks, etc., that you described as under the agreement of June 1, 1903?

A. Yes, sir.

Q. Mr. Martin, will you please state, as far as you can recall, the number of operating subsidiary companies of the Great Northern which have operated in Minnesota subsequent to 1890, when you came with the company?

A. I think the Eastern Minnesota and the Willmar & Sioux Falls Railway Companies are the only ones besides the Great Northern-Minneapolis, Western Railway Company.

Q. About the Duluth Terminal?

A. The Duluth Terminal Railway Company, yes.

Q. Are they all Minnesota corporations?

A. I believe they are; I think so, yes, sir.

Q. They were operating companies during the time that you have been with the Great Northern?

A. Yes, sir.

Q. As operating railway companies did they report their gross earnings for taxation exactly the same as the East-
[fol. 79] ern Railway Company of Minnesota and exactly as the Great Northern reported its gross earnings during the period of its operation?

A. Just the same, yes, sir.

Q. During the same period of time were there a number of other Great Northern subsidiary corporations operating in other states and operating lines in connection with the lines of the Great Northern?

A. There were some others, yes, sir.

Q. Will you name some of those?

A. Duluth, Watertown & Pacific Railway Company, the Montana Central Railway Company, Spokane Falls & Northern Railway Company, Seattle & Montana Railroad Company. Those were the principal ones, I think.

Q. Of the companies which you name as operating companies in the state of Minnesota and as operating companies without the state of Minnesota did the Great Northern Railway Company own all of the capital stock thereof, directors' shares excepted?

A. There were a few shares of the Spokane Falls & Northern Railway Company—a dozen or so—that were outstanding; the Great Northern owned all of the stock of the Montana Central, the Duluth, Watertown & Pacific; I think there were a few shares of Seattle & Montana outstanding—perhaps two. But in the main the Great Northern owned all of the stock of these companies.

[fol. 80] Q. What have you to say with respect to Canadian companies?

A. There are—or were,—nine companies in Canada (I think that was the number), separate corporations, the stock of which was owned by the Great Northern: the Manitoba, Great Northern Railway Company; Brandson, Saskatchewan & Hudson Bay; Bidlington & Nelson; Crows Nest Southern; Nelson & Fort Shepard; Red Mountain; Van Couver, Victoria & Eastern Navigation Company; New Westminster, Southern Railway Company; and one-half of the ownership of the Midland Railway Company of Manitoba.

Q. Were most of those Canadian companies organized at the instance of the Great Northern Railway Company?

A. I think not in their original organization. The Nelson & Fort Shepard and the Red Mountain were entirely independent companies to start with; New Westminster, Southern was; I think the Brandon, Saskatchewan & Hudson Bay was a local organization.

Q. Did the Great Northern become the owner of all the capital stock of those companies?

A. Yes, excepting the Midland, of which one-half belonged to the Great Northern.

Q. Excepting the Midland, yes. In other words, just as was the case with the Duluth, Superior & Terminal Company, in which it acquired other interests, it acquired the stock of these Canadian companies in some instances from other people and in some cases it organized the company? [fol. 81] A. Yes, sir.

Q. Do those companies own railway lines in Canada?

A. All excepting the Bidlington & Nelson which I named; that has no line now.

Q. Were those lines connected with the lines now owned by the Great Northern Railway Company?

A. Yes, sir.

Q. Mostly at the boundary?

A. Yes, sir.

Q. Does the Great Northern own an undivided interest—or not an undivided interest either, but a half interest in the stock of any other railroad companies?

A. It has a half interest in the stock of the Spokane, Portland & Seattle Railway Company.

Q. What lines of railway are owned and operated by that company?

A. The line from Spokane down the Columbia River to Portland, Oregon, and branch lines from Fallbridge to Bend, and from Portland to Salem, Oregon, and from Portland to Wilkesborough, Oregon, and some other branches—line to Astoria from Portland.

Q. What other railroad company owns the other undivided half interest of the stock of the S. P. & S. Railroad Company?

A. Northern Pacific.

Q. Did the Northern Pacific and the Great Northern cause the S. P. & S. to be created and construct its line from Spokane to Portland?

[fol. 82] A. Yes, sir.

Q. Does the Great Northern own any interest in the Chicago, Burlington & Quincy Railroad?

A. Yes, sir; it with the Northern Pacific, each having an equal interest, have something like 97% of the stock of the Burlington Company.

Q. That company operates approximately 9,000 miles of railway?

A. Yes, as much as that.

Q. And it connects with the Great Northern both at St. Paul and at Billings, Montana?

A. And at Sioux City, Iowa, yes, sir, three points.

Q. With reference to all the subsidiaries of the Great Northern which you enumerated as operating both in Minnesota and without Minnesota, did they operate and conduct themselves as common carrier railroads the same as all other railroads in the territories where they exist?

A. Yes, sir.

Q. They made all their own reports?

A. Yes, sir.

Q. Had their own officers?

A. Yes, sir.

Q. Maintained their own properties?

A. Yes, sir.

Q. Operated their own properties?

A. Yes, sir.

Q. Paid their own taxes?

A. Yes, sir.

Q. Did the Great Northern divide the interline earnings of all of its subsidiary companies in the same man-

[fol. 83] ner that it divided interline earnings of all other railway companies with which it was connected?

A. There was a division made of all the earnings so that an assignment was made to the subsidiary companies the same as to outside companies. I mean on the same principles.

Q. In other words, the Great Northern Railway Company in making its report for the purposes of the gross earnings tax during all the years you mentioned ascer-

tained its gross earnings by getting its proportion of all interline earnings where those earnings were earned both on its own railroads and that of other companies?

A. Yes.

Q. And that in making those reports it ascertained its own earnings with respect to interline earnings in connection with its subsidiary companies in the same manner as it ascertained its earnings in connection with all other companies?

A. Yes, sir.

Q. That fact was known and was apparent from the reports of the company, was it not, to the Minnesota Tax Commission and to the authorities of the state of Minnesota charged with examining the reports of the company?

A. Yes, they had reports.

Q. Were the reports of the Great Northern from time to time examined by the Public Examiner?

A. They were.

Q. And were the accounts of the company from time to time checked?

[fol. 84] A. Yes, sir.

Q. By the Examiner?

A. Yes, sir.

Q. Mr. Martin, I think you testified this morning that for a number of years you were vice president and comptroller of the Great Northern Railway Company?

A. Yes, sir.

Q. In charge of the accounts of that company?

A. Yes, sir.

Q. And it was under your jurisdiction and supervision that the Great Northern Railway Company made all its gross earnings tax returns?

A. Yes, sir.

Q. You are, therefore, familiar with the methods employed of ascertaining the gross earnings of the Great Northern under the gross earnings tax law of this state?

A. Yes, sir.

Q. Assuming, Mr. Martin, an interstate shipment originating, as an illustration, at Chicago and destined to Minneapolis, and assuming that shipment arriving at Minneapolis has to be switched by some local company and that the consignee does not accept it promptly and demurrage ac-

crues; will you please state what is done with respect to reporting gross earnings as to the demurrage charges and as to the switching charges.

A. All of the amounts collected for local service, like switching and demurrage, are returned to the state of Minnesota 100% in the gross earnings tax returns.

[fol. 85] Q. In other words, the terminal charges described which accrue as a part of and are incident to an interstate earning are not divided on a mileage pro-rate?

A. No, they are not divided.

Q. Taking the reverse of the movement and as another illustration, Mr. Martin, assuming a shipment from Minneapolis to Seattle and destined for export, hauled by the Great Northern from Minneapolis to Seattle and there placed in its yards at Seattle subject to switching charges to the port, subject to demurrage charges for failure of the consignee to take them or for the vessel to be ready, and subject to any other so-called local terminal charges; does Minnesota get any tax upon those charges?

Court: Terminal charges.

A. No, sir.

Q. In other words, those charges at the terminals are segregated from the so-called line haul, and the line haul is pro-rated?

A. Yes, sir.

Q. On the mileage basis. Has that been the practice in reporting gross earnings for taxation purposes, to your knowledge, during all the period of time that you have been familiar with this subject?

A. That has been the way of handling the interline earnings—or interstate earnings. The local to the state earnings, of course, are 100% in addition to that to the state of Minnesota.

[fol. 86] Q. Are there any other terminals that you know of, that you can describe, beside the two that we have used in illustration and which are incident to interstate shipments, which are not pro-rated for the purposes of making a return under the gross earnings tax law?

A. Storage of freight and baggage. I don't recall any others besides the switching and demurrage. I presume there are some few charges of different kinds.

Q. Elevation charges?

A. Very little of that. There are some such charges as that, yes.

Q. Mr. Martin, are you sufficiently familiar with the custom and practice of all Minnesota railroad companies in making their reports under the gross earnings tax law to say whether or not they have followed the same practice that the Great Northern has with respect to these so-called terminal charges incident to interstate shipments?

A. I think they all do just the same as the Great Northern; it is a uniform practice.

Q. I think this morning, Mr. Martin, in response to a question from Mr. Ryan you stated that the Lake Superior Company, Limited, was organized at the instance of the Great Northern Railway Company; do you wish to correct the statement in any way?

A. I have looked up the records during the noon hour, and I think I should not have said that.

Q. Did the Great Northern ever own, directly, indirectly or beneficially, the shares of the Lake Superior Company, Limited?

[fol. 87] A. No, it never did.

Q. Did you have time to ascertain the date of the organization of that limited partnership?

A. Yes. It is July 25, 1899.

Q. Mr. Martin, can you give approximately the investment cost, or the amount, as we say, invested in roadway which is invested in the railway lines and in the docks engaged in the transportation of ore?

The Court: Does that refer only to the terminal there or to all the railroad lines?

Mr. Lindley: Just the lines engaged in the transportation of ore over which this ore is handled from the Missabe Range down to Saunders and then from Saunders east to and including the docks. In other words, what I propose to show, if Your Honor please, is about the amount of investment in the property in the state of Wisconsin and in these docks, and about the amount invested in the state of Minnesota in the lines engaged in the handling of this traffic.

Mr. Ryan: I wouldn't like to see that value established in that way. Go at it more carefully and get more of the details.

Mr. Lindley: Well, there are only two ways that I know. That is, I thought, the simple way, Mr. Ryan. One way is showing the cost to reproduce them, and another way to show what it has cost to produce them. The cost of reproduction is a very elaborate method.

Mr. Ryan: I will object to that for the present on the ground that there is no foundation laid, Mr. Martin hasn't [fol. 88] been shown qualified to testify on that point, and, as I say, I thought Mr. Lindley ought to embody more. I will have to offer the objection at this time.

The Court: I shall sustain the objection to the general question as it is asked now.

Mr. Lindley: I will qualify the witness, if that is the purpose.

Q. Mr. Martin, I think you stated that you were comptroller for a number of years?

A. Yes, sir.

Q. For the Railway Company. The accounts of that company were kept under your supervision and jurisdiction?

A. Yes, sir.

Q. And they were kept as required by the rules and regulations covering the classification of accounts promulgated by the Interstate Commerce Commission?

A. Yes, sir, since there were such rules as that.

Q. Do those regulations require and does the Great Northern keep its books so as to show the amount of money invested in roadway and structures?

A. Yes, sir.

Q. And are you able from your familiarity with the accounts which have been kept under your supervision and jurisdiction to determine and state the amount invested in the lines and in these docks which are here involved?

A. Yes, sir.

Q. And in the railway lines over which the ore is transported?

[fol. 89] A. Yes, sir.

Q. Will you please state the amount invested in the properties east of Saunders?

Mr. Ryan: Same objection.

The Court: No, the only reason why I sustained your objection is because he had them bunched together; if he gets at the valuation of those docks I will allow it.

Mr. Ryan: Well, it already appears that those docks were bought at a receiver's sale. If he wants to get at that, I suppose the only thing to ask is what was paid for them at that receiver's sale; there is no objection to that.

Mr. Lindley: Well, your objection is that he is not going to state just what we have invested in the docks, separate from the other property?

Mr. Ryan: No, I don't know what he is going to say.

Mr. Lindley: He is going to state what the Company has invested in the property east of Saunders.

The Court: I will allow that.

A. In different years that, of course, varies, because the properties have been added to, but——

Q. Well, starting in the year 1912?

A. 1912 is what I have the figure for here, and from the ore docks to Omaha Crossing the amount is $5,294,137.

Q. And from the Omaha Crossing to Saunders?

A. Well, I have that figure from Omaha Crossing to the state line; I haven't it divided at Saunders.

[fol. 90] The Court: Well, to the state line.

Witness: $1,676,686.

Q. What is the distance from Saunders to the state line, Mr. Martin?

A. About nineteen or twenty miles. That is, it is nineteen or twenty miles—

Q. From Saunders to the state line?

A. Well, Saunders to the state line is—It is nineteen or twenty miles total; must be about twelve or thirteen miles perhaps. I haven't got the figure.

Q. Now, what is it from Saunders to the Omaha Crossing?

A. The figure that I gave you was from the Omaha Crossing through to the state line.

Q. That is what I thought.

A. Yes, Omaha Crossing to the state line, not Saunders; I had no division at Saunders.

Q. Yes, Omaha Crossing to the state line. That is, the two figures combined give the investment value or cost for the year 1912 from the west Minnesota state line to and including the docks?

A. Yes, sir.

Q. Now, can you give for the same year the investment of the Company in the lines west of the Minnesota-Wisconsin state line, and devoted to the transportation of ore?

Mr. Ryan: The same objection is made, and the further objection is made that an investment and value, as I understand it, means nothing here; it is of no particular importance what the value was in 1912 unless we are going [fol. 91] through with it into the earlier years when the situation was very materially different.

The Court: Do you refer now to all lines whether they run into these particular docks or not?

Mr. Lindley: I refer only to the lines, if your Honor please, over which this ore moves.

The Court: That go to these docks?

Mr. Lindley: Yes.

The Court: That is all right, I will allow it then.

A. The state line to the Missabe Range, with the lines on the Range, $10,878,951.

Q. Can you give the investment figures for the year 1911 for the same properties that you have just given those figures for *for* the year 1912?

A. Yes, sir.

Q. Will you please state them?

A. For 1911, from the ore docks to the Omaha Crossing, $5,398,476; Omaha Crossing to the state line, $1,631,450; total, $7,029,926; state line to Missabe Range, $10,739,828.

Q. Can you give the same figures for the year 1910?

A. For 1910, ore docks to Omaha Crossing, $3,954,743; Omaha Crossing to the state line, $1,600,842; total Wisconsin, $5,555,585; state line to Missabe Range, $10,365,297.

Q. And for the year 1909?

A. Ore docks to Omaha Crossing, $3,828,069; Omaha Crossing to the state line, $1,549,498; total Wisconsin, $5,377,567; state line to Missabe Range, $9,012,206.

[fol. 92] Q. And for the year 1908?

A. Ore docks to Omaha Crossing, $3,837,014; Omaha Crossing to the state line, $1,531,886; total Wisconsin, $5,398,900; state line to Missabe Range, $8,982,903.

Q. Mr. Martin, when were the principal rules and regulations covering the classification of accounts for steam roads promulgated by the Interstate Commerce Commission?

A. Beginning with July 1, 1907.

Q. Explain just what is meant when we speak of investment in roadway and structures according to the accounts kept according to the regulation of the Interstate Commerce Commission.

A. The investment in road and structures includes the new money that is spent for additions and improvements and extensions to the Company's property, as distinguished from the expenditures that are made for the current operation of the line.

Q. Do they include the original cost and expenditures subsequent to the time the lines were put in operation, in the way of additions and betterments?

A. Yes, they include the cost of construction when the line is built, such as roadway, grading, rails and ties, all the different bridges and buildings that are constructed when the line is first built. And then as time goes on and additional facilities are required, such as more sidetracks or passing-tracks or new yards, new depots, those are addi- [fol. 93] tional investment charges, and all told they make up the investment in the road of the company.

Q. Just as an illustration explain how those accounts would work with reference to the creation of the concrete and steel ore dock that you have mentioned when it was put in there in place of a wooden dock.

A. Well, the concrete and steel ore dock wasn't put in place of the wooden dock, but if that should be a case, the procedure would be to write out of the investment account the amount standing in that account for the old structure which had been torn down and abandoned, and then put into the property account the total cost of the new structure.

Q. Mr. Martin, please explain how the earnings of the Great Northern are ascertained with respect to what are called interline shipments, that is, shipments moving over the lines of the Great Northern and over the lines of connecting carriers.

A. Usually there are through rates named between all of the principal points, and a large part of the shipments move on through way-bills; that is, a way-bill which covers the movement of the freight from the point of origin, say on the Great Northern road, to destination on some other road. At the time those rates are named, division sheets are prepared showing how much of the through rate is assignable to the Great Northern and how much is assignable to the other company or companies over whose lines the freight moves.

[fol. 94] Q. Those division sheets are a matter of agreement between the various companies engaged in the transportation of the traffic?

A. Yes, sir, those are agreements between the companies. For instance, if you had a shipment moving from Fergus Falls, Minnesota, to Chicago, passing from Fergus Falls to the Minnesota Transfer over the Great Northern, and from Minnesota Transfer to Chicago over the Burlington, there might be a rate of a dollar for the through shipment, on which the division sheet would show fifty cents to the Great Northern and fifty cents to the Burlington.

The Court: Well, isn't that regulated by law?

Witness: The division sheets are not, no sir; that is a matter of agreement. The tariffs themselves are filed with the Interstate Commerce Commission, and——

The Court: What I am trying to get at; doesn't the Interstate Commerce Commission determine what proportion shall go——

Witness: No, sir, they don't.

The Court: You mean you can divide any way you please?

Witness: Yes, sir.

The Court: By agreement?

Witness: Yes, sir.

Q. Explain that a little more fully to the Court, Mr. Martin. In the event the parties do not agree, then the Commission has jurisdiction to determine how much one carrier should get out of the rate and how much the other carrier [fol. 95] should get; is that not so? I am not surprised that you hesitate, because there are not many cases of disagreement; but the Commission has jurisdiction.

A. There are not many cases of disagreement, and I am not quite sure what the Commission's power is in that re-

spect. I know that we have had a few cases where the division has been in dispute for some little time, and then we have divided on some temporary division and left the settlement to be made at some later date as a final settlement.

Q. Well, the law will speak for itself, of course; it is very clear that in the event the carriers cannot agree how to divide a through charge——

The Court: Well, it seems to me there must be some final sort of a court to determine that.

Q. —the Commission is given jurisdiction. We have just such a case before the Commission today.

A. Well, of course, it would mean this: While the matter is in process of division the company that had the money would give the other road what it said the division should be, and it would keep for itself what it said belonged to it.

Q. Now, Mr. Martin, so much of an illustration you gave, but assuming a shipment where the Great Northern carried the same in part through Minnesota, in part through Montana, and then some other carrier carried; how would you, first, get the Great Northern's proportion of the earnings, and then how would you get the Great Northern proportion of the earnings to be reported under the gross earnings tax law?

[fol. 96] A. The Great Northern proportion of the earnings would be its proportion of the through rate according to the division sheets, and after that had been determined, the division between states, so as to give Minnesota its proportion for gross earnings tax purposes, is on the mileage basis.

Q. On the mileage basis, excluding the so-called terminal charges to which you have referred a short time ago?

A. Well, those terminal charges are on another tariff from the through tariff. There is a switching tariff, for instance, that is a separate tariff by itself, and these charges that are made for the interstate and interline movement are made upon rates which do not have the switching charges included in them.

Q. That isn't universal, is it, necessarily?

A. Well, I think that is the practice in its effect.

Q. Well, there is such a thing as a switching tariff filed with the Interstate Commerce Commission to cover switching movements incident to interstate shipments, and there

is a switching tariff likewise applicable to the wholly local movements within a state?

A. My recollection is that all of the switching movements are covered by one tariff, so that a switching tariff might have rates for switching at Minneapolis and at Fargo and at Great Falls and Spokane and Seattle.

Q. But the point I am getting at is, those rates are not necessarily the same with respect to a shipment which is wholly a state shipment and with respect to a shipment that [fol. 97] is an interstate shipment.

A. Oh, no, not necessarily, no.

Q. And the charges covering the switching movements within a state, the same are subject to the state authorities, whereas, if a movement is one of interstate shipment the charge is subject to the Interstate Commerce regulation?

A. Unless the Interstate Commerce Commission has it all now. During this period, you mean, under discussion?

Q. Yes.

A. That was true, yes, sir, prior to March 1, 1920.

Q. But so far as the gross earnings tax law is concerned and the returns that are made thereunder no distinction is made with respect to whether or not the switching charge was one made under an interstate tariff or made under a state tariff?

A. No, sir; the switching collections, if in the state of Minnesota, are reported 100% to Minnesota, and if outside of the state are not reported to Minnesota at all.

Q. Now, reverting again to the method of handling your interline divisions on through shipments, please apply that to the case before the Court with respect to interline charges, first as between the Eastern Minnesota and the Duluth, Superior & Terminal Railway Company, then as between the Great Northern and the Duluth, Superior & [fol. 98] Terminal Railway Company, and then as between the Great Northern and the Dock Company.

Q. The rate on iron ore from the mines to the dock is a through rate, and the practice was to give a division of that rate to the Duluth, Superior & Western Terminal Company as a division of the rate, and the balance would be the revenue of the Eastern Railway Company of Minnesota during

the time it operated, and that revenue would be divided between Minnesota and Wisconsin on the mileage basis.

Q. On that basis the Great Northern returns for gross earnings tax purposes during the period in controversy, from 1901 to 1912 were made?

A. Well, 1901 to May 1, 1902——

Mr. Lindley: Well, I will withdraw the question.

Q. Take the year 1901 to May, 1902, it was upon the basis that you describe the Eastern Railway Company of Minnesota made its return?

A. Yes, sir.

Q. For the gross earnings tax purposes, to Minnesota?

A. Yes, sir.

Q. And subsequent to May, 1902, it was upon the basis that you have described that the Great Northern made its return?

A. Yes, sir.

Q. For gross earnings tax purposes to the state of Minnesota.

A. Yes, sir.

[fol. 99] Q. Will you please state what the division of the through rate in Minnesota was from May, 1901, until May, 1902?

A. The Duluth, Superior & Western Terminal Company's proportion of the eigty-cent rate was twenty-five cents, and the Eastern Minnesota proportion fifty-five cents.

Q. Per ton?

A. Per gross ton or long ton; per ton of 2,240 pounds.

Q. What was the division as between the Great Northern and the Duluth, Superior & Terminal Railway Company from May, 1902, until June, 1903?

A. The same division; twenty-five cents to the Dock Company and fifty-five cents to the Great Northern Railway Company.

Q. Per ton?

A. Per long ton, yes, sir.

Q. What was the division as between the Great Northern Railway Company and the Allouez Bay Dock Company subsequent to June, 1903?

A. From June 1, 1903, to July 31, 1908, the Duluth, Superior & Western Terminal Company was still the owner, but the Allouez Bay Dock Company was the lessee, so that

during that period the division was the same, but twenty-five cents went to the Dock Company and fifty-five cents to the Great Northern Railway Company. The same division was made from August 1, 1908, to November 30, 1908, and from December 1, 1908, to July 31, 1909—from August 1, [fol. 100] 1909, to December 25, 1911, the Dock Company's allowance as a division of the rate was twenty-two cents, and the Great Northern Railway's proportion fifty-eight cents of the eighty-cent rate per long ton, and on December 26, 911, the eighty-cent rate having been reduced to sixty cents per long ton, the division was fifteen cents to the Dock Company and forty-five cents to the Great Northern Railway Company.

Q. Now, was the division of this through rate as between the Eastern Railway Company of Minnesota and the Duluth & Superior Terminal Company during 1901 and until May, 1902, handled by those two companies in the same manner that the Eastern handled all its interline accounts with other connecting railway companies?

A. Yes, sir. The proposition was really the same as a prepaid shipment in the way that it was actually handled. The collections at that time were made monthly, and from the Dock a statement was made to the auditing office in St. Paul showing the tonnage that had been handled for each firm who should pay the freight. A draft was drawn by the Great Northern treasurer upon each one of these mining companies from whom the money was due in order to secure the collection of the money. That brought it into the Great Northern treasury, just exactly the same as any prepaid shipment at a local station, as, for instance, in my Fergus Falls illustration, where the money was paid at Fergus Falls for the shipment from Fergus Falls to Chicago. The accounts with other companies are handled [fol. 101] through what was known as the Foreign Line Joint Settlement accounts, and the Allouez Bay Dock proportion of the rate was assigned, through that account, to the Allouez Bay Dock Company just the same as proportions to any other railway company were assigned to those companies on the Great Northern settlement sheets.

Q. Well, take these revenues which accrued to the Dock Company, what disposition did the Dock Company make of

the same after the payment of its operating expenses, taxes, etc.?

A. Some of the money was used for building new docks, as that was the time in which the construction of docks was active, and dividends were declared out of the surplus funds, and a certain amount of surplus was kept on hand; handled just the same as any railroad company's money would be handled, just the same as the Great Northern money was handled.

Q. Did the Dock Company make any returns under the federal capital stock tax law?

A. Yes, sir.

Q. And its accounts and books were so kept as to show that it had earned during these years the revenue in proportion to its division on the ore roads?

A. Yes, its books were kept just exactly like the books of any of the other railroad companies.

Q. And it made a distribution of its income available for dividends the same as any other corporation?

[fol. 102] A. Yes, sir.

Q. Made a distribution of such income. I think my question a moment ago related solely to the handling of the interline accounts for the year 1901 and 1902 as between the Eastern and the Duluth, Superior Terminal Company; did that same practice obtain subsequent to May, 1902, as between the Great Northern and the Duluth, Superior Terminal Company and later as betwen the Great Northern and the Dock Company?

A. Yes, sir.

Q. This morning you were questioned with respect to the published tariffs which had been filed with the Interstate Comemrce Commission; have you been able to locate or do you know of any tariff prior to the earliest one introduced in evidence August, 1906?

A. No, I haven't been able to find any. There are two places that would have them if there were any; one would be the traffic department and the other would be in the auditor of freight receipt's office, which during this period was under my jurisdiction, and I have had search made, and it seems to be the fact that there wasn't a published tariff prior to that tariff that we had this morning.

Q. During all the period involved here and up to that date, however, the rate was eighty cents?

A. Eighty cents.

Q. Per ton?

A. Per gross ton, yes, sir.

Q. And it was well known on the Missabe Range to all shippers to be eighty cents a ton?

[fol. 103] A. Oh, everybody knew about the eighty-cent rate, yes, sir.

Q. And it was the same on all the roads serving the Missabe Range and transporting ore to lake ports?

A. Yes, sir, there was only that one rate, so that everybody knew all about that one rate.

Redirect examination.

By Mr. Ryan:

Q. Mr. Martin, you said in correction of your statement this morning that the Lake Superior Company, Limited, was not organized at the instance or direction of the board of directors of the Great Northern Railway Company; what were the facts in that connection?

A. The company was organized under this Michigan law by the three people—I think it was three—as far as I know, on their own motion. I drew a conclusion this morning that I shouldn't have drawn; when I came to look up the record of the company—I had forgotten just how it was organized when I spoke.

Q. Well, it is a fact, is it not, that those organizers of that company who were the principal officers of the Great Northern Company at the time subsequently recognized and declared that all of the property that they had acquired was acquired for the Great Northern with the Great Northern money?

A. I don't know that I could say that it was so exactly in the way that you have stated it. There were stocks and [fol. 104] securities turned over to it by the Great Northern Railway Company.

Mr. Lindley: Under the agreement that——

Witness: Under the agreement, yes.

Mr. Lindley:—that was put in evidence?

Witness: The agreement that we had here this morning.

Q. Well, but isn't it a fact, Mr. Martin, that those stocks and securities had prior to that time been in the possession of the Lake Superior Company, Limited, for the Great Northern? Hadn't that company acquired those stock for the Great Northern with Great Northern money?

A. No, not as you state it. There were stocks and securities of the Great Northern which were turned over by the Great Northern to the Lake Superior Company, Limited; there were some other stocks and securities which were purchased after the Lake Superior Company, Limited, had the stocks that were turned over to it from the proceeds or the income coming from those stocks.

Q. Well, let us get at it in this way: Isn't it a fact that the Lake Superior Company, Limited, had no money of its own?

A. Yes.

Q. At its inception?

A. That is true.

Q. Isn't a fact that Mr. James J. Hill and the other organizers of that company did not put into that company any of their own funds?

A. That is true.

[fol. 105] Q. Do you know what funds did go into that company—where they came from?

A. These stocks and securities that were turned over to the Lake Superior Company, Limited, by the Great Northern, a great many of them had dividends paid upon them, and the proceeds or the income from those stocks was the source of the money that was used for purchasing such other securities as were purchased by the Lake Superior Company, Limited, after the first lot of stocks had been turned over to it by the Great Northern.

Q. And of course, the Lake Superior Company, Limited, paid nothing to the Great Northern for those stocks and securities?

A. They were turned over to the Lake Superior Company, Limited, by the Great Northern without any payment for them, yes, sir.

Q. And thereafter the Lake Superior Company, Limited, held them for the Great Northern Company subject to the

direction of the Great Northern Company through its board of directors and stockholders?

A. Yes, sir.

Mr. Lindley: Pursuant to that agreement.

Mr. Ryan: Yes.

Q. And the stock of this Duluth & Superior Terminal Company, then, as you now state it, was in the possession and ownership of the Great Northern Railway Company prior to the organization of the Lake Superior Company, Limited?

A. That particular stock, as I remember it and as I [fol. 106] think I said this morning, was issued in several different sections.

Q. I mean the original issue of stock.

A. The original issue I believe was immediately turned over to the Lake Superior Company, Limited, although the Great Northern was the subscriber to the stock. I would like to verify that; I think I have these figures here. The company, as I said this morning, was not organized in Great Northern interests—the Duluth, Superior & Western Terminal Company—and the first issue of stock was for $500, which was subscribed for in cash by the incorporators. That was in July, 1897. In July, 1898, the is-ue of $250,000 was made, and the other $500 was secured from those original incorporators, and that whole amount of $250,500 for the stock was taken up on the books of the Lake Superior Company, Limited, at that time.

Q. Well, the Lake Superior Company, Limited, wasn't organized at that time?

Mr. Countryman: At what time? I didn't get that last date, Mr. Martin.

Mr. Ryan: 1898.

A. Oh, that is right; that is right; I will have to correct myself on that by getting this other statement. The Duluth, Superior & Western Terminal Company's stock of $250,500 was of the first lot that was turned over, and I think that will be shown on the agreement—I haven't a copy of the agreement—which would have been in July, 1899, [fol. 107] instead of 1898. So that the Great Northern

would have held the stock for the year from 1898 until 1899, if I am correct about this statement.

Q. Now, during the time that the Eastern Minnesota was in operation were trains operated over the line Twin Cities through Hinckley to Superior—through trains?

A. Eastern Minnesota trains were operated from the Twin Cities through Hinckley to Superior, yes, sir.

Q. Well, did the Eastern Minnesota Company have a line into St. Paul or the Twin Cities at that time?

A. No, did not at the start. The Eastern Minnesota, at the start, operated on the Great Northern—or the Manitoba line, and the Great Northern line by the way of Elk River, Milaca, to Hinckley, and then on its own line from Hinckley to Superior. At a later date the Eastern Minnesota built a line from Hinckley through Cambridge to Coon Creek, and owned its line as far as Coon Creek, using the Great Northern line from Coon Creek into the Twin Cities for its trains.

Q. The Eastern Minnesota then used the line of the Great Northern into the Twin Cities?

A. Yes, sir.

Q. Did the Great Northern itself operate any line between the Twin Cities and Superior in 1901 and 1902?

A. No, the Great Northern only operated on its lines as far as Hinckley. It did operate its own trains over its lines that were used by the Eastern Minnesota Railway, but [fol. 108] not through service of the Great Northern into Superior.

Q. Do I understand you to say that the Great Northern passenger trains out of the Twin Cities went no farther north than Hinckley in 1901 and 1902?

A. The Great Northern had a passenger train that went from the Twin Cities via Elk River, Princeton, Milaca; it had other passenger trains running from Willmar through St. Cloud to Hinckley. What I mean is that there were passenger and freight trains of the Great Northern being operated on the Great Northern lines at the same time that the Eastern Minnesota trains were using those lines in order to make its through service into the Twin Cities.

Q. Yes, but when those Great Northern trains, whether passenger or freight, in 1901 and 1902, left the Twin Cities

and went as far as Hinckley did they stop there or did they go on to Superior?

A. They did not go through to Superior as Great Northern trains.

Q. As Great Northern trains. Did the same cars go through?

A. In freight service, yes. And after the Hinckley fire, when the terminals of Hinckley were destroyed, the terminals were moved to Sandstone instead of Hinckley, so that the Great Northern trains of wheat, for instance, moving from St. Cloud towards Superior, ran to Sandstone.

Q. Well, did the cars stop there or did they go right along?

[fol. 109] A. Oh, cars went right through, of course, to Superior.

Q. The difference was that they were called Great Northern trains as far as Hinckley, and later to Sandstone, and after that they were called Eastern Minnesota trains, were they?

A. Well, the crews handling the trains as far as Sandstone were Great Northern crews, paid by the Great Northern Railway Company on its pay-rolls. I would say that it would be no different than as if we should have a train of wheat from St. Cloud going to Chicago, and turned over that whole train to the Burlington at Minnesota Transfer. The cars, of course, would go right through. At that period of time they were not transferring the cars of one line to another, and there were no transfers at Sandstone.

Q. Well, was there any special or peculiar arrangement after the burning of Hinckley between the Great Northern and the Eastern Minnesota in respect to carrying its crews on to Sandstone?

A. Well, the Great Northern crews instead of stopping at Hinckley as they had previously done, ran through to Sandstone, which was made the terminal. When the terminals were rebuilt it was considered more advantageous to locate a few miles farther along, at Sandstone than at Hinckley. I am making that distinction because the word "Hinckley" was used there as representing the junction point; it was Hinckley part of the time, but Sandstone the rest of the time. That is the only reason for my explanation there.

[fol. 110] Q. Well, at the present time there is no separate ownership. Do the through crews of passenger and freight trains—Great Northern crews—go from the Twin Cities to Duluth without stopping?

A. Oh, yes.

Q. Without getting off?

A. Yes, sir.

Q. That is true as to both passengers and freight?

A. I think it is true to an extent of freight, although, according to convenience, a good many of the crews do change at Sandstone, but the through passenger train service between the Twin Cities and Duluth is accomplished by through trains of cars and through locomotives and through train crews and engine crews and so on.

Q. That is, at the present time?

A. Yes.

Q. Now, in 1901 and 1902 wasn't that also true as to passenger trains?

A. Oh, yes, just the same as to passenger trains, but that was an Eastern Minnesota operation at that time, which made it necessary for them to use certain Great Northern property.

Q. In the actual, tangible operation of the trains on the rails it was no different then than it is now, was it?

A. Not in the operation, no, but the Eastern Minnesota had to pay rentals for the use of the Great Northern property where it used it.

Q. There was a difference in bookkeeping, wasn't there, [fol. 111] but the actual movement of the train as between the Great Northern and the Eastern Minnesota in 1901 and 1902 was exactly the same as it is today, and the Great Northern owns and operates the entire line.

A. The movement of the passenger trains from the Twin Cities to Duluth was the same; through service of cars and engines and crews in the Eastern Minnesota operation as it is in the Great Northern operation now, yes.

Q. Now, when the trains went out of St. Paul to Superior what were they called, Great Northern trains or Eastern Minnesota trains?

A. Those through trains were Eastern Minnesota trains.

Q. The through trains were Eastern Minnesota trains?

A. Yes, sir.

Q. There were no through trains over the Great Northern called Great Northern trains?

A. No, sir.

Q. Now, is there any difference in the actual tangible operation of the cars—trains—on the rails, now, of the Great Northern properties, as compared with the actual tangible operation of the trains and cars in 1901 and 1902 over the same lines o the Great Northern in this state?

A. No. Explaining that the cut-off by the way of Cambridge, which is being used now in place of the old line by the way of Princeton and Milaca, but the train movement [fol. 112] in order to reach Duluth from the Twin Cities, or vice versa, on the through passenger trains is the same movement.

Q. Now, you said that the Eastern Minnesota Company in 1901 reported its gross earnings for taxation—its earnings upon the ore lines; do you know whether it did that in 1900?

A. Yes, I think there was no difference in 1900.

Q. Do you know whether it made any deductions from gross earnings reported in 1900 on account of any payments or expenses at Allouez Bay?

A. There was a division of the rate in 1900 the same as there was in 1901.

Q. Did the Eastern Minnesota make any deduction from the entire amount received by it for hauling ore from the mines to the boats on account of any division of earnings or rates in 1900?

A. The Eastern Minnesota gave the Duluth, Superior & Western Terminal Company a proportion of the rate and kept the balance of it for itself, the same in 1900 as in 1901.

Q. Is it not a fact, however, Mr. Martin, that the Eastern Minnesota in 1900 paid to the state of Minnesota its gross earnings taxes on the basis of its entire receipts from hauling ore prorated on a mileage basis, without regard to any division with the Terminal Company?

A. Well, I wouldn't think so, but I couldn't absolutely say that there was any change in the practice. I know that there was a division of the rate prior to this time that we speak of, but I would have to look that up as of a certain [fol. 113] date to see whether there was any change in practice. As far as I know, there wasn't.

Q. Well, at least you know that the Public Examiner, as is indicated by the fact that we are only proceeding for the year 1901, failed to discover any such deduction?

A. Well, I couldn't say as to that from anything that I have in my memory now; no, I couldn't tell.

Q. You don't know?

A. No, I don't know.

Q. I think I am entitled to ask now the same question that the Court ruled out this morning: Do you know whether or not the Great Northern in 1913 reported its earnings on the basis of a mileage pro-rate of its entire tariff charges from the mines to the dock, without respect to any deduction?

Mr. Countryman: We renew the objection that was made to the same question when it was asked this morning, as immaterial, irrelevant and not within the issues here.

The Court: I shall sustain the objection again.

Q. Now, Mr. Martin, you were asked generally whether or not the Allouez Bay Dock Company did not make its public reports, so far as it was required to make public reports, as a separate and distinct corporation, and your answer was it did; isn't it a fact that for a long period of years the Great Northern Railway Company reported to the state of Wisconsin for the purpose of taxation that it was the [fol. 114] owner of the Allouez Bay Docks, and did not that result in an assessment against the Great Northern Railway Company which included the Allouez Bay docks?

Mr. Countryman: For what years?

Mr. Ryan: For many years, not specifically—prior to 1913.

A. That condition did not obtain for many years; I think it obtained for possibly two or three years. It did obtain at one time, yes, sir, and then after the assessment had been made in that way the amount which was assignable to the Allouez Bay Dock Company was billed against that company.

Q. Yes, but the Allouez Bay Dock Company did report to the state of Wisconsin that it was the owner of the Allouez Bay docks during some few years?

A. I think that that was not in the shape of a report.

Q. No.

A. It was an assessment which was made by the state and in which the state included that property of the Allouez Bay Dock Company with the property of the Great Northern Railway Company in one total ad valorem account.

Q. No, but didn't you as comptroller make a return for the purpose of taxation of the property of the Great Northern Company in Wisconsin, beginning at the state line, including the property that has been valued here and running [fol. 115] to and including the dock, and didn't you list that all as the property of the Great Northern Railway Company and put a value upon it for the purpose of taxation, didn't an assessment follow, and didn't the Great Northern Company pay the state of Wisconsin a tax resulting?

A. As comptroller I never made the returns to the states which have the ad valorem basis; there were two or three changes in the tax methods in the state of Wisconsin, but I don't believe that as comptroller I ever made any returns to the state on the ad valorem basis as you have described.

Q. Did any officer, under your direction or control, of the Great Northern Railway Company, make such a report?

A. Those reports for all of the states which do not have the gross earnings tax are prepared in the office of the Tax Commissioner, who never was under my jurisdiction. Now, just exactly what the procedure might have been in connection with those values for the years you have mentioned, I couldn't say excepting that as comptroller I know that there was a division made of the amount of taxes, and a bill prepared against the Allouez Bay Dock Company for what was considered to be its proportion of the taxes that were assessed in that way.

Q. You can get, however, Mr. Martin, can you not, copies of such reports if they exist?

A. Copies of those reports, if they exist, no doubt are in our general office files down at the building.

[fol. 116] Q. I suggest that you look after those and I think you will find them as far back as 1905, down to and including all the time here in controversy.

A. From 1905 down to including 1912?

Q. Yes, 1912. There was some change in the method of taxation, some confusion in taxation in 1910 or 1911.

A. Yes, sir, that is what I had reference to, is to the changes that were made in the Wisconsin methods of taxation during that period.

Q. Yes. Now, in respect to the docks themselves during this period 1901 to 1912, inclusive did any other company than the Great Northern, and for the period of 1901 and 1902 the Eastern Minnesota, or any other railway company, have access to those docks?

A. No, sir.

Q. There were railway lines in the vicinity of the docks, were there not; other railway lines?

A. Yes, sir, but not ore-carrying roads.

Q. Not ore-carrying roads. Well, in 1911 and 1912 didn't any of the other roads carry ore?

A. Not from the Missabe Range.

Q. The Omaha and the N. P. and the Soo were——

A. The Omaha has no ore, the Northern Pacific and the Soo have ore from the Cayuna Range.

Q. But their tracks come into the vicinity of these docks, do they not?

A. Well, their tracks entering Superior are none of them very far apart, but the Northern Pacific and the Soo Lines have their own ore docks over which they handle any ore [fol. 117] that may be transported on their lines.

The Court: I understand that these docks take nothing except Great Northern ore—the Allouez ones, the ones we are treating about—they take no other ore except ore that comes over the Great Northern tracks?

Witness: Well, your Honor, that is not quite correct, because sometimes the ore owners who have a mixture of ore to make want to bring to the Allouez docks some ore that is hauled over the D. M. & N. for instance, like a mine located on its lines, and that ore in their cars would then be switched over to the Great Northern and moved up on to the Great Northern docks by the Great Northern engines.

The Court: But the Great Northern does the hauling?

Witness: No, the Great Northern doesn't have the line haul on such ore as that. There is not a great deal of that, but I think this last year there was something like 100,000

tons of ore from the Petit mine, which came over the D. M. & N. from Duluth and then was switched from Duluth over to the Great Northern docks at Allouez and mixed there with other ore belonging to the same people, belonging to the Petit mine, and came down, and then it was all loaded from the Great Northern pockets into the boats, so that the line haul of that ore was not Great Northern line haul.

Q. But that ore such as you speak of only comes on to [fol. 118] the Great Northern line on some special or peculiar occasion, when a special mixing is necessitated, and it is a very trivial part of the ore that goes on to the dock, is it not?

A. Yes, as I say, this year I think it was about 100,000 tons, and the total amount of ore handled over the docks was four and one-half million tons.

Q. And in the period up to 1912 it was true that, substantially speaking, only Great Northern cars carrying ore over Great Northern main ore lines came upon those docks?

A. Yes, sir, that is true.

The Court: Now, I understand practically the only revenue that this Allouez Bay Dock Company has is this twenty-five-cent division that you spoke of some time ago, and then twenty-two, and then fifteen, over the haul from the mines. That is practically the only source of revenue of the Allouez Bay Dock Company?

Witness: I think aside from that they had a revenue of $26.40.

The Court: Then these amounts come out of that twenty-five cents, the amounts in litigation there? (Showing witness paper.)

Witness: Oh, yes, sir; yes sir.

Adjourned until the morning of December 7th.

Q. Mr. Martin, I expect to refer to some of the disconnected matters about which you talked on examination yesterday. First, about examinations of the railway books and interline divisions and the like. When the Public Examiner goes to your office to audit your gross earnings tax [fol. 119] report, is he able to check, from any information in your office, the basis of your interline divisions?

A. The check in the accounting department, which is the place that he would work, would not give him the basis of the interline divisions, because they are made as matters of agreement between traffic managers, and the division sheets, after the agreement is made, are passed to the accounting department for them to use as a basis of the apportionments, but the details of the basis as originally arrived at are not in the accounting department.

Q. And the details of the basis on which the division was made would not be available to the Public Examiner?

A. I would think they would be available to him. I don't know of anything that we have in any of our records anywhere that the Public Examiner can't get if he wants it. We always throw open everything to him so that he can get anything that he asks for in any of the departments.

Q. Well, assuming that to be true, Mr. Martin, the basis of division of earnings between yourself and a connecting line is not always founded upon accounts or computations existing any place in the Great Northern office?

A. They are not always based on computations, but there are certain methods that are pretty generally used, and I would think he would have no trouble in following the basis in just the same way that the traffic men do when they [fol. 120] make the basis, go through certain procedures to arrive at the amount each company shall have out of a certain rate.

Q. Will you state to us what those general principles which usually governs the division of rates between connecting companies are.

A. I don't make those division sheets, and never have, but I know in a general way that they consider mileage——

The Court: Not exclusively, though?

Witness: Oh, no, mileage is only one element that would enter into it. The general physical characteristics, such, for instance, as if one line had no terminals and another line had large terminals that were involved in the shipment, the whole thing, in every case, is probably a matter of bargain with certain of these things back in the minds of the men who are making the divisions. I couldn't say as to the details that would govern, because I think that no doubt each case has more or less of a peculiarity of its own.

The Court: Well, in a case like this where the dockage company has to do a certain amount of work not ordinarily incident to railroad work, like thawing out and this other matter you have spoken of before, they would naturally receive a larger percentage of the mileage than if such were not the case, wouldn't they?

Witness: All of those things would be taken into consideration in the peculiar case that might be developed—people who were making the divisions. The thawing of the [fol. 121] ore is a rather expensive process and would make some difference in arriving at the divisions.

Q. By the way, before leaving that, isn't the thawing of that ore the duty of the Railway Company, the obligation of the railway company to unload this ore from its cars?

A. No, the Dock Company, during the time that it was in existence, had the unloading to do, and in that last contract that we referred to, which I think was 1909, I believe that you will find it specifically provided that the Dock Company shall bear the expense of thawing the ore. That is mentioned as one of the items in that agreement. It is a part of the expense of getting the ore ready so that it can be unloaded. The freezing of it is nothing much different, except in an exaggerated way, of the trouble that is experienced in unloading sticky ore, where the men have to stand on top of the cars and by the side of the cars with pikepoles and punch until they get some holes through the bottom of the car.

Q. Well now, on these interline divisions you say that is a matter of negotiation?

A. Yes.

Q. Have you any idea how much per ton that steaming would cost?

A. I haven't in mind the figures for it. It is slow and expensive, but I couldn't say from memory what the cost per ton might be for that.

Q. It wouldn't cost anything like a fraction of a cent per ton? It wouldn't cost anything like a cent per ton, would it?

[fol. 122] A. I would think considerably more than that; it is a pretty slow process after the ore is frozen to get it thawed out.

Q. But I mean in reference to the amount of ore that went over this dock during the year.

A. Oh, you mean to apply the total of the ore that might be handled all through the good weather of the summer as against the cost of thawing the ore in the spring and in the fall when it would be frozen?

Q. Yes.

A. Oh, no, it wouldn't be a big amount per ton as applied to the total tonnage. It is quite an expense as applied to the tonnage that is actually thawed, but as applied to the total tonnage not so.

Q. Well, just where would be the element of expense there, Mr. Martin? You have got the coal to furnish the steam, the employes to run the steam plant——

A. Well, those are the elements of expense; the labor that it takes to do it, and the coal that it takes to do it, and, in case of locomotives, the use of the locomotives assigned to that service and taken out of other service.

Q. The point that I am driving at, Mr. Martin, probably can be more pointedly stated in this way, that the Dock Company received for handling this ore amounts ranging, in 1902, from a million and forty-six thousand dollars to two million and eighty-seven thousand dollars in 1912. Would you say that the cost of steam there was any significant amount compared with those figures?

[fol. 123] A. Well, as I said, the cost of the steaming being applicable only to a comparatively small quantity of the ore, would not amount to very much per ton as applied to all of the ore that was moved over the dock during the season; a large part of it did not require that special treatment.

Q. Well, for instance, it wouldn't cost any more to steam that ore, abstractly, than it would cost to heat your St. Paul Great Northern freight house, would it?

A. Yes, I think it would, because you have the whole carload of ore that you have to penetrate, and it is pretty slow to get the steam through from the outside to the ore inside sufficiently to thaw all of it so that it will go down through the openings in the bottoms of the cars.

Q. But the requirement of doing that only exists during a very short period?

A. Yes.

Q. Possibly not to exceed two months in the year, does it?

A. During the early part of the shipping season, say in April, perhaps, and in the latter part of the shipping season, say in November.

Q. And heating a large freight house during six or seven months in the year wouldn't it be a fair statement that it wouldn't exceed the cost of doing that?

A. You mean as to whether the cost of thawing the ore during the time that we thaw it, would compare with the cost of heating the freight house for the winter, or something of that kind?

[fol. 124] Q. Yes.

A. Oh, I don't know as there would be much comparison of that, but I presume that the thawing of the ore would be more than heating the freight house, because all of the storage of the freight house is not under steam, it would be the office part of it.

Q. But broadly and fairly and concretely that is not an unfair comparison, is it?

A. Well, I couldn't say exactly that, but I have said that the thawing of the ore, comparatively to the total amount of ore handled, is not an extensive amount per ton.

Q. Now, Mr. Martin, another point in connection with your interline arrangements: I understood you to say that the Great Northern does now, or has in the past, made divisions with its subsidiary companies and reported only its divisions for taxation in Minnesota.

A. Yes, it made divisions with the subsidiary companies that were in Minnesota making gross earnings tax returns.

Q. Now, this is true, too, is it not, that the report made by you to the Tax Commission or to the proper taxing officials would not show that your calculation of earnings was made upon the basis of a division of earnings with the subsidiary companies beyond the boundaries of the state?

A. The report that is made to the taxing authority is a very brief report and deals only in total amounts of money.

Q. And it would follow, would it not, that that report [fol. 125] would not disclose that in reaching your totals

you had included only divisions with subsidiary companies and not the entire earnings prorated on a mileage basis?

A. The report itself would not disclose any of those details, but for many years the blank report contained instructions as to how the figures should be arrived at, and the report has to be sworn to, so that the manner of getting at the figures is sworn to on the report as being in accordance with those instructions.

Q. But that does not include a showing that included in your figures were divisions with companies which you owned or controlled?

A. It wouldn't show anything in the report as to the divisions themselves, and that is the information that the Public Examiner gets when he comes to make the examination of the accounts.

Q. Well, that leads up to that point. When the Public Examiner comes to your office to check the gross earnings reports, which he does only at wide intervals, is that not the fact—he comes to your office only at rather lengthy intervals to check reports?

A. That is true, but when he comes to check he starts where he left off the previous time, if it is one year or three years or five years.

Q. Yes, and when he comes to your office to check, he finds that you made divisions with certain other railways, is there any information available to him which will enable him to determine that one of those other railways might be [fol. 126] a subsidiary of the Great Northern?

A. Certainly, yes.

Q. And is there any information available to him upon which he can determine what the basis of that division was?

A. Yes.

Q. And in what form is the information upon which he can determine the basis of such division in your office?

A. He can go right to the so-called apportionment sheets which cover the division that is made for the interline shipments in detail, and can determine from that how much of each rate has been kept by the Great Northern and how much has been assigned to each one of the other companies involved. He can go to the file of the division sheets and

see if those division rates have been properly applied, and there is no reason, if he wants to do it, why he couldn't go to the place where the division sheets are made and see how they were arrived at.

Q. Well, that would be assuming that there was something coming to his attention which gave him notice that those divisions were divisions between the Great Northern and a connected company.

A. It would all show in the reports exactly what companies were involved.

Q. Well, not in the reports?

A. In the sheets, the reports on file in the office, the apportionment sheets and the other reports, the working re-
[fol. 127] ports that are on file in the accounting offices.

Q. There you would know and place before the Examiner information as to which companies are subsidiary companies of the Great Northern, would you?

A. Well, the names of the companies are shown, if it is the Eastern Minnesota Railway—Do you mean whether something is said in the report somewhere that the Eastern Minnesota Railway is a subsidiary of the Great Northern? No, that doesn't appear anywhere.

The Court: But if he wants to pursue the subject and find out, it is open to him?

Witness: Oh, certainly.

Q. Well, for instance take this Allouez Bay Dock Company, what would there be about that division that would suggest to the Public Examiner, if he went in there, that the Allouez Bay Dock Company was owned by the Great Northern?

A. If he was looking at those reports, there would be nothing on those reports to indicate it to him.

Q. If he from some source obtained information that the Allouez Bay Dock Company was connected with the Great Northern, and pursued his lead, he could get the information as to the relationship of the Dock Company to the Great Northern and the basis of divisions; that is what you mean, is it not?

A. Yes; it is all open to him; everything is open to him.
[fol. 128] Q. It is open to him once he starts his inquiry?

A. Well, that is what he is there for, is to inquire into those things.

Q. Well, but on the face of this transaction, for instance, a division with the Allouez Bay Dock Company, on the face of the books and accounts there would be nothing to suggest to the Examiner that the Allouez Bay Dock Company was the property of the Great Northern?

A. No, not on those reports, but those things are matters of such common knowledge that I haven't any doubt that the Examiner knows the subsidiary companies of the Great Northern or of any other company that he is examining.

Q. Now, you said on your examination yesterday that in respect to interline hauls the railway *railway* companies involved published in their tariff a through rate and then agreed between or among themselves as to the division of that through rate which each would receive.

A. Yes, sir.

Q. Those tariffs are all published, are they not; they are all filed with various Railway Commissions and made public?

A. Yes, sir.

Q. And they are joint tariffs, are they not?

A. Yes, sir.

Q. Whenever the Great Northern Railway Company makes a rate with a connecting company it joins with that company in issuing a tariff which is known as a joint tariff, and it is issued over the name of two or more companies, is it not?

[fol. 129] A. Yes, sir, that is the custom.

Q. Now, referring to Exs. E to I, inclusive, are those tariffs covering this iron ore haul joint tariffs or are they single line tariffs of the Great Northern?

A. There is no name on those tariffs, as I recall it, except the Great Northern name.

Q. So that those are not joint tariffs and they are not similar rates to those which you refer to?

A. There is no name on the tariffs excepting the Great Northern name.

Q. Now, in respect to so-called terminal charges—I think what you call local charges: If you—that is, the Great Northern Company—bring into St. Paul a carload of goods from a point outside of the state to be delivered to a consignee here off your line so that switching charges would

be involved, would you, in reporting your earnings for taxation, deduct the switching charge which you were compelled to pay to your connecting company in St. Paul?

A. Some of the switching charges are absorbed, and in that case they are deducted; some of them are collected from the consignee in addition to the freight haul.

Q. Well, are you sure, Mr. Martin, that when you bring into St. Paul a carload of goods and then deliver that at a point off your line so that you have to pay a switching charge—do you deduct that switching charge from the Minnesota proportion of the charges which you receive for that shipment?

[fol. 130] A. That is my recollection of the process.

Q. Before reporting?

A. I may be mistaken; I am not entirely sure about that; I would rather look that up, if you will allow me to, before I answer positively on that point.

Q. Now, Mr. Martin, I want to go back over your testimony in reference to the stock ownership and control of the Dock Company and the Terminal Company, which I am in doubt about having cleared up yesterday. The Allouez Bay stock was first acquired by the Lake Superior Company, Limited; what became of it afterwards?

A. The Lake Superior Company, Limited, held the stock until January, 1908, when it was sold to the West Missabe Land Company, Limited.

Q. The West Missabe Land Company?

A. Limited.

Q. Who owned the stock of the West Missabe Land Company?

A. The West Missabe Land Company was one of the companies the stock of which was with the trustees of the Great Northern Iron Ore Properties.

Q. Did the Lake Superior Company, Limited, originally own the stock of the West Missabe Land Company?

Mr. Lindley: When do you mean?

Q. Originally. Did the Lake Superior Company, Limited, ever own the stock of the West Missabe Land Company?

A. The stock of the West Missabe Land Company was [fol. 131] held by the Lake Superior Company, Limited, at one time.

Q. Now, you say in January, 1908, the stock of the Allouez Bay Dock Company was transferred to the West Missabe Land Company by the Lake Superior Company, Limited; that was done, was it not, pursuant to a resolution of the board of directors of the Great Northern Railway Company?

A. Yes, sir, it was.

Q. It is also true, is it not, Mr. Martin, that there was no money actually paid by the West Missabe Land Company to the Lake Superior Company, Limited, for that stock?

A. No, sir.

Q. You say there was money paid for it?

Mr. Lindley: There was no money paid?

Witness: No, he says it is true that there was no money paid.

Mr. Lindley: And you say it is not true?

Witness: I say it is not true.

Q. You say that there was money paid?

A. Yes, sir, there was money paid.

Q. How much?

A. At par, $100,000, par value of the stock.

Q. That was in January, 1908?

A. Yes, sir.

Q. That was all of the stock of the Allouez Bay Dock Company, was it not?

A. Yes, sir.

Q. Now, what did the West Missabe Land Company do with the stock?

[fol. 132] A. The stock was sold to the Great Northern Railway Company in the early part of 1913.

Q. Early in 1913 all of the stock came back from the West Missabe Land Company to the Great Northern?

A. Yes, sir.

Q. And immediately after the first part of 1913 the Great Northern transferred all of that stock to the Allouez Bay Dock Company itself for the dock, did it not?

A. Yes, sir.

Q. Now let us make clear, Mr. Martin, the transfers of the stock of the Duluth, Superior & Western Terminal Company. That came into the possession of the Great Northern first when?

A. In July, 1898.

Q. Then, you have already testified, that was transferred to the Lake Superior Company, Limited?

A. Yes, sir.

Q. What did the Lake Superior Company, Limited, do with it?

A. It delivered the stock of the Duluth, Superior & Western Terminal Company to the Great Northern in March, 1912.

Q. And what became of the stock after March, 1912?

A. The Great Northern surrendered it to the Terminal Company in exchange for certain notes of the Allouez Bay Dock Company that the Terminal Company held, excepting that five shares were retained in Great Northern possession. [fol. 133] Q. After January 1, 1901, and for some period which we won't speak about now, the Terminal Company, in addition to owning the docks, owned about six miles of track intervening between the docks and Saunders, did it not?

A. Yes, sir, it owned the line from Saunders east to the lake shore, including the docks.

Q. Did the Terminal Company ever lease that six miles of line to the Dock Company?

A. No.

Q. What became of that six miles.

A. It was leased to the Great Northern Railway Company from Saunders to the Omaha Crossing at the same time that the portion of the property east of Omaha Crossing, including the dock, was leased to the Allouez Bay Dock Company.

Q. That would be in 1903, would it not?

A. Yes, that was June 1, 1903.

Q. In 1901 and 1902 what was the situation in respect to that six mile stretch of track?

A. As to ownership, it belonged to the Duluth, Superior & Western Terminal Company.

Q. As to operation?

A. Operated by the Duluth, Superior & Western Terminal Company.

Q. Well, it must have been operated by the Duluth, Superior & Western Terminal Company in connection with the Eastern Minnesota, was it not?

A. Yes, sir. As I explained yesterday, the locomotives of the Eastern Railway went east of Saunders with the trains of cars and handled the ore up on the docks, but a bill was made by the Eastern against the Duluth, Superior [fol. 134] & Western Terminal Company for the expense of that engine service. The switching crews which were in charge of the movement east of Saunders were employes of the Duluth, Superior & Western Terminal Company and paid on their payrolls, and all of the men working on the docks unloading the cars were employes of the Terminal Company, carried on that company's payrolls, as well as all of the expense of maintaining the docks and their tracks from Saunders east.

Q. Prior to June 1, 1903, then, the Terminal Company operated this six-mile stretch and the docks?

A. Yes, sir.

Q. Thereafter the Dock Company operated the docks, the Great Northern operated the six-mile stretch?

A. Yes, sir.

Q. Was that six-mile stretch of tracks subsequently conveyed to the Great Northern?

A. Yes, sir.

Q. When if you recall?

A. On August 1, 1908.

Q. Now, those various transfers of property leases by the Dock Company to the Duluth, Superior & Western Terminal Company, were each made pursuant to and in obedience to the resolution of the Board of Directors of the Great Northern Railway Company directing the Lake Superior Company, Limited, to authorize and require those things to be done, were they not?

[fol. 135] A. Well, I wouldn't want to say in a lump way for all of those items that each one of them was done so.

Q. Well, let us get at it specifically. You may recall this resolution, a resolution of September 21, 1908, directing the Lake Superior Company, Limited, to cause the Duluth, Superior & Western Terminal Company to sell

and convey as of the date of August 1, 1908, to the Allouez Bay Dock Company the docks that the railway lines are situated on, extensions are all owned by the Duluth, Superior & Western Termnial Company. There was such a resolution, was there not?

A. I couldn't say. I don't find a copy of the resolution in this paper that I have here.

Mr. Lindley: Mr. Ryan, you put in evidence the agreement between the Railway Company and the Limited Company, and I think it provides that the Limited Company will handle everything that is put in its hands under that lease according to the directions given to it by the Board of Directors of the Great Northern. Now, is it necessary, in view of that power which is expressed in that instrument as to how it should be done, that you go ahead and prove that it was done according to the instrument?

Mr. Ryan: Well, no, this goes a little bit further, Mr. Lindley. You see, what I am pointing out is here a resolution was adopted directing the Lake Superior Company, Limited, to cause the Terminal Company to do this.

[fol. 136] Mr. Lindley: Well, that is in accordance with that instrument that you put in evidence.

Mr. Ryan: Well, we don't want any question about it. What I am trying to make clear is that all these transfers, these leases, all these arrangements made by the Dock Company, by the Terminal Company and by the Lake Superior Company, Limited, were made in obedience to and pursuant to the resolutions of the Board of Directors of the Great Northern Railway Company directing exactly what shall be done.

Mr. Lindley: Your statement is too broad; so far as the Limited Company is concerned, it was the agent of the Railway Company, because the Supreme Court of Minnesota has so determined.

Mr. Ryan: Yes.

Mr. Lindley: And according to the instrument which you have put in evidence, it agreed to handle the securities which were placed in its hands according to the direction of the Great Northern, but the other companies acted through their own Board of Directors and at the response of their own shareholders.

Mr. Ryan: Well, the shareholders were the Lake Superior Company, Limited.

Mr. Lindley: The shareholders of what?

Mr. Ryan: Of the Allouez Bay Dock Company and the Terminal Company.

Mr. Lindley: I don't follow that statement.

Mr. Ryan: Well, I think that these resolutions—the one specifically that I refer to—tend to establish the point that I make, and the one following it the same thing.

[fol. 137] The Court: Have you copies of the resolutions there?

Mr. Ryan: No, I have merely a statement of what they contain. I will simply ask Mr. Martin or Mr. Lindley to produce a correct copy of that resolution.

Mr. Lindley: What is the date of the resolution?

Mr. Ryan: September 21, 1908. I have stated the substance.

Mr. Lindley: A resolution adopted by what Board?

Mr. Ryan: Board of Directors of the Great Northern Railway Company.

The Court: If you have the dates you can unquestionably get them.

Mr. Lindley: We will see that they are furnisehd for the record if we know the exact ones that counsel wants.

Mr. Ryan: And another resolution on the same date.

Mr. Lindley: Let Mr. Martin make a notation of it.

Mr. Ryan: Both the same date, September 21, 1908, directing the Lake Superior Company to cause the Terminal Company to convey its property to the Dock Company.

Mr. Martin: That was a resolution of the Board of Directors of the Great Northern Railway Company?

The Court: Do you remember that?

[fol. 138] Witness: No, I don't remember that. I am getting a record of it.

The Court: All right.

Mr. Ryan: Now, another resolution on the same day, directing the Lake Superior Company, Limited, to cause the Terminal Company to sell to the Great Northern this part of the Terminal Railway between Saunders and the dock.

Witness: If there was more than one resolution of the date—I think there was—I better find what the first one was for.

Mr. Ryan: The one was directing the Terminal Company to sell the dock to the Allouez Bay Dock Company.

Witness: Yes, I have that.

Mr. Ryan: By the way, Mr. Martin, in one of these agreements between the Dock Company and the Railway Company a connection between the Great Northern and the Dock Company tracks at Sixth and Hatch streets in Superior, Wisconsin, is referred to. Is that Sixth and Hatch street connection approximately the terminus of that six-mile stretch that we referred to?

Witness: Wasn't that the connection with the Northern Pacific Railway at Omaha Crossing? That is the only one I think of that existed there.

Mr. Ryan: Would that correspond generally with the description that we have used, or the phrase we have used, "the Omaha Crossing"?

Witness: I don't remember that location of Sixth and Hatch street. Have you got a description of it?

[fol. 139] Mr. Ryan: It is referred to in this. (Plffs. Ex. J.)

Witness: May I call for a map that is down in the audience there? Mr. Sanborn has a map that perhaps may help me. (Witness looks at map.) Yes, sir, Sixth and Hatch street, on this map, is practically the Omaha Crossing.

Mr. Ryan: That explains that.

Witness: Yes, sir.

Q. Now a question in reference to the Eastern Railway Company of Minnesota. I understood you to say yesterday that that company now owned no property and operated no property but still remained alive as a corporation?

A. Yes, sir.

Q. Has it any officers?

A. Yes.

Q. It has officers?

A. All the companies are officered, whether they are operating or not.

Q. But it has now no property or assets of any kind whatever?

A. No, sir.

Q. Do you know when it last had any property or assets of any kind?

A. July 1, 1907.

Q. I think yesterday, Mr. Martin, you were to ascertain whether or not the Great Northern Company had reported to the State of Wisconsin for taxation purposes and has included in its property the Allouez docks.

Mr. Lindley: Mr. Ryan, to save time, while the witness is [fol. 140] looking that up, can we have it understood between the parties that either side may have considered in evidence any of the statutes of the State of Wisconsin which they may desire?

Mr. Ryan: Sure.

The Court: It may be so understood.

Mr. Lindley: May we also have it understood that either side may have considered in evidence the rules and regulations of the Interstate Commerce Commission with reference to the account of steam carriers and other companies subject to their jurisdiction with respect to operating revenues, operating expenses and capital debentures?

Mr. Ryan: That may be understood, subject to the objection that it is immaterial.

The Court: It may be understood.

Mr. Countryman: Upon that understanding, references to our quotations from the statutes of Wisconsin or the orders of the Railroad Commission may be made without introduction in evidence, I understand?

The Court: Yes.

Mr. Countryman: There is also, Mr. Ryan, a decision of the supreme court of Wisconsin bearing on the matter of the Allouez Bay Dock taxation and its reports to the Railway Company; I haven't the citation, but if you want to refer to it, we have got it.

Mr. Lindley: It is the case of City of Superior vs. the Allouez Bay Dock Company, 164 N. W. 362. We would like to have the same understanding with respect to that case that we have with respect to the statutes of Wisconsin.

[fol. 141] The Court: The Court would want all that information anyhow before we got through; if it didn't get it before we finished it would afterwards.

Mr. Lindley: May I suggest, if Mr. Ryan has something else that he wants to proceed with that he give the witness a chance during the noon hour to find out as best he can about that question.

Mr. Ryan: We will pass that, then, Mr. Martin, for the present.

Witness: Will you just tell me exactly the question and I will see if I can't get the answer from the records.

Q. What we want is the reports made by the Great Northern taxing officials of Wisconsin in which the Great Northern reported itself to be the owner of the Allouez Dock property and placed a value upon it.

Mr. Lindley: If any such reports were made.

A. For any particular years? These reports are by years.

Q. Yes. I don't know during what years you made those reports.

The Court: Prior to 1912 for the present.

Mr. Ryan: Yea, 1911 and 1912 and possibly for some prior years. I thought yesterday it extended back to 1905, but I don't believe it did.

The Court: What you are after is to find out whether they were the owners of the Allouez Bay Dock Company, is that it, before the tax——

Q. There are two points: One is to correct Mr. Martin's impression given by his first statement, that the Allouez [fol. 142] Bay Dock Company maintained a separate existence and filed its own reports in all instances, and he indicated that in some instances it did not; and the other is to put a value upon the property of the Allouez Bay Dock Company and the Great Northern in Wisconsin, and particularly because the Great Northern apportioned its value, the value of its properties in Wisconsin. It declared in that report that the Dock Company represented 14.25% of the value of the line from the state line to the end of the dock.

A. Well, these first three reports that are here are the reports of the Duluth, Superior & Western Terminal Company for June 30, 1903, 1904 and 1905, and the Duluth, Superior & Western Terminal Company in those reports includes or reports these properties and specifies that they are leased to the Allouez Bay Dock Company and are assessed locally. There is a statement of mileage, and that is all that there is in these reports of the Duluth, Superior

& Western Terminal Company covering those years. Then I was stuck at that point, from the information we had here. But I can say this, Mr. Ryan, that during certain years, as I said yesterday, the state or the city (I think it was during the time that the city complication in taxes came in) did assess the Great Northern and the Allouez Bay Dock Companies together and that 14.25% of that total tax was billed by the Great Northern against the Allouez Bay Dock Company as being its proportion of the total tax on account of all of the property which had been included by the state in one assessment.

[fol. 143] Q. Well, we might as well complete that in the event that you don't find your actual report. Do you know what kind of property was included in that assessment which you speak of?

The Court: You mean on which the Great Northern was assessed alone, including the whole business?

Mr. Ryan: Yes, the one in which you apportion to the Dock Company 14.25% of the taxes; what property of the Great Northern and what property of the Allouez Bay Dock Company was included in that assessment?

A. Well, in a general way all of the property of the Great Northern located in the city of Superior, which would include the grain elevators, the merchandise and coal docks and all of its yard tracks and shop buildings—in fact, all of the property of the Great Northern and of the Dock Company. It was this property which we have called Dock Company's property, being the portion east of the Omaha Crossing to the lake, including the docks and the tracks thereon and the buildings that I have described yesterday.

Q. Did it include personal property? Include cars and equipment?

A. I would think not, but I am not absolutely sure about that; but I think not, I think it is real property.

Q. Well, we will pass that for the present, Mr. Martin, and see what can be learned. Now we will return to this question of investments represented by the Allouez docks. Those docks were bought, were they not, by the Terminal [fol. 144] Company at the receiver's sale?

A. Whatever property was in existence belonging to the Duluth & Winnipeg Terminal Company in this exact lo-

cality was purchased at the foreclosure sale, but that included only old Dock No. 1.

Q. And it included the track to Saunders, did it not?

A. No, I think not.

Q. Where did the Terminal Company get the track from Saunders to the dock?

A. Supplementing my other answer, the property secured at the foreclosure sale consisted of the real estate on Allouez Bay, one ore dock and the line of railway from Omaha Crossing to Allouez leading to the ore dock. The Duluth, Superior & Western Terminal Railway Company purchased a portion of the line that belonged to the Superior Belt Line & Terminal Railway Company from Omaha Crossing or Allouez to the Eastern Minnesota Railway Company at Saunders.

Q. Now, was this Belt Line Company connected in any way with the Great Northern or the Eastern Minnesota?

Mr. Lindley: At that time?

Mr. Ryan: Yes, at that time.

A. My recollection is that that was not at any time connected, but it is long ago and I am not quite sure; but my record here indicates that it was controlled by the Northwestern Coal Railway Company.

Q. And your impression is that your company was not [fol. 145] connected with this Northwestern Company?

A. No.

Q. That there was no relation?

A. No.

Q. Now, what did the Terminal Company pay for the dock property upon its original purchase?

A. A total amount of $760,000.

Q. There was but one dock at that time?

A. One dock and the railway east of the crossing, as I described it a few minutes ago.

Q. That is the approach to the dock?

Mr. Lindley: That was the railroad.

A. From Omaha Crossing east, all the railroad that there was from Omaha Crossing east.

Q. Now, thereafter, as you have previously testified, from time to time additional docks were built?

A. Yes, sir.

Q. And was a dock built to replace this original Dock No. 1?

A. The old Dock No. 1 that came from the Duluth & Winnipeg Terminal through the foreclosure was later torn down and an entirely new Dock No. 1 was built in that location.

The Court: This has all been very thoroughly gone over, Mr. Ryan.

Mr. Ryan: Yes, that part of it.

The Court: He has testified to the construction of all those various docks and how it was done.

Mr. Ryan: But we are now going into the cost and the manner in which it was paid for.

[fol. 146] Q. Now, in 1901 and 1902 the second dock was built, was it not? Well, you have given those dates. Do you know how much Dock No. 2 cost?

A. $1,337,180.

Q. Who paid the cost of constructing that dock?

A. The Duluth, Superior & Western Terminal Railway Company.

Q. Where did it get the money, do you know?

A. I can't say where that specific money came from, no.

Q. Do you know whether or not it came from the Great Northern or the Eastern?

A. I have a record of the construction of all of the docks, and I would think from this record that the money used for these capital purposes was that received from the sale of additional capital stock which was issued from time to time by the Terminal Company.

Q. What was the total capital stock of the Terminal Company?

The Court: When?

Mr. Ryan: In 1901 and 1902, when this dock was built.

A. Well, I testified as far as the original stock was concerned it was $250,500. At that time the authorized capital was $500,000, and in April, 1900, the remaining amount of $249,500 was issued, and in May, 1900, the authorized

capital was increased to two million dollars, and additional up to two million dollars were issued in 1900, 1901 and 1903, two million dollars being their total authorized capital, which was all of it issued by the middle of 1903.

[fol. 147] Q. Well now, then, apparently the stock was increased to two million dollars and it was sold to the Lake Superior Company, Limited, which had no money.

A. The Lake Superior Company, Limited, subscribed for the stock at these different times when it was offered for sale.

Q. And at that time the Lake Superior Company had no money.

Mr. Lindley: Why do you assume that? All these securities were in its possession.

Mr. Ryan: Well, they got that in 1899.

Q. Well, at any rate, it sufficiently appears that the Lake Superior Company was the Great Northern; so that is where the money came from that went into its treasury when this stock was issued?

A. I should assume that that was the money that was used for building these additional docks.

Q. Now, when was the next dock built?

A. Well, two million was all the stock that was issued; that was the total amount.

Q. No, you misunderstood.

The Court: When was the next dock built?

A. Oh, I misunderstood him. I haven't the exact date of the building of the first part of No. 2, but it must have been in 1900, and the second part of No. 2, the extension to the harbor line, was built in the winter of 1901 and 1902.

Q. That was the dock to which you have just referred?

A. That was Dock No. 2, the second dock, which was built in two parts.

[fol. 148] The Court: Well, but that was the first one that was built in addition to No. 1 which was there when they bought.

Witness: The first one was built by the Terminal Company in addition to No. 1 which came over from the purchase.

Q. Now as to the next dock, which I assume would be Dock No. 3,—

A. Yes, sir.

Q. —when was that built and at what cost?

A. The first part of Dock No. 3 was built in the winter of 1902 and 1903, and the extension of it in the winter of 1905 and 1906, and the cost of that dock was $959,271.

Q. Now the next dock constructed.

A. Dock No. 1 which came over from the Duluth & Winnipeg Terminal Company was dismantled in the winter of 1906 and 1907, and new No. 1 was then constructed in that location that same year.

Q. And at what cost?

A. $1,076,438.

Q. Now the next construction?

A. Dock No. 4 in 1910 and 1911, at a cost of $1,626,142.

Q. Which of those docks were constructed by the Terminal Company and which by the Dock Company?

A. The Terminal Company constructed No. 2 and No. 3 and rebuilt No. 1; Dock No. 4 was built by the Allouez Bay Dock Company.

Q. Now, do you think, Mr. Martin, that Dock No. 3 and [fol. 149] the reconstruction of Dock No. 1 by the Terminal Company was taken care of out of further increases in its capital?

A. There was no capital stock issued in excess of the two million dollars, and my record in connection with that shows that in addition to the two million dollars the Terminal Company owed the Lake Superior Company, Limited, for advances, the amount of which I have not here.

Q. Then substantially or broadly, to the extent that that cost of those docks exceeded two million dollars the money was advanced to the Terminal Company by the Lake Superior Company, Limited?

A. Not entirely that, as there were some bonds outstanding also.

Q. Before passing that, who held the bonds?

A. In 1897, in connection with the purchase of the property formerly owned by the Duluth & Winnipeg Terminal Company, first mortgage, four percent fifty-year bonds to the extent of $500,000 were issued. The Eastern Railway Company of Minnesota purchased those bonds.

Q. Now, as to Dock No. 4 do you know whether or not the Allouez Dock Company had to go outside of its own treasury to obtain the money to build that dock?

A. I can't follow that exactly, but in connection with all of the expenditure after August 1, 1908, there was an application of surplus earnings to the property of about $600,000, also a fund for renewal of the docks had been set up of nearly $400,000.

[fol. 150] Q. Is that total, or yearly?

A. This is total. This is showing the source of money that was used after August 1, 1908, for capital expenditures, and undoubtedly included Dock No. 4, which I understood was what you were asking about. There was also $240,000 of money borrowed from the trustees of the Great Northern Iron Ore Properties and some miscellaneous items of indebtedness that it was intended to make good out of future earnings, amounting to about $60,000. I can't follow those through and identify the application.

Q. I think a few days ago, Mr. Martin, I asked you if you had with you a copy of the lease from the Terminal Company to the Dock Company, and my recollection is at that time you said you didn't have it. Have you looked for that or have you been able to find it since?

A. A copy of which?

Q. Of the lease from the Terminal Company to the Dock Company, dated June 1, 1903.

A. No, I haven't looked for it. I will look for it this noon, if you will give me the description of it.

Q. The lease bears date June 1, 1903, and it recites the existence of Docks No. 1 and 2, and that Dock No. 3 was under construction. Here is one of the points that I wanted to get at, that the Dock Company agreed to pay to the Terminal Company on account of Dock No. 1, $1,666.67 each month until the dock shall be rebuilt or until the payments aggregate $151,676.66; and in that connection I wish to ask you if you know why the Dock Company was required to [fol. 151] pay that amount, $151,000, in round numbers, on account of Dock No. 1.

Mr. Countryman: Well, you want the document itself, and then if he produces it, why you will ask him questions about it. You seem to be going into the whole subject of the contents of it and we haven't got it before us.

The Court: We won't have any further questioning on it, because we will have the document here.

Q. Mr. Martin, have you with you a statement of the dividends paid by the Dock Company for the years 1901 to 1912, inclusive, and dividends declared by the Terminal Company during that same period?

A. Yes, I have a statement of dividends.

Q. May we have that statement, please? You might read it into the record.

A. The Duluth, Superior & Western Terminal Company paid the following dividends—these are all for years ended June 30th: In 1901 the amount was $200,000; 1902, $500,000; 1903, $711,666.66; 1904, $140,000, and the same for 1905, 1906, 1907 and 1908; 1909, $23,333.34; 1910, $100,000; 1911, $100,000; 1912, $100,000. The Allouez Bay Dock Company, for the year ended June 30, 1903, $100,000; 1904, $375,000; 1905, $1,000,000; 1906, $900,000; and there comes the split in the years, so that this is for the year ended December 31, 1907, $2,000,000; December 31, 1909, $1,435,000; 1910, $735,000; 1911, $1,000,000; 1912, $1,450,000.

[fol. 152] Q. Now, in 1908 the dock property was conveyed by the Terminal Company to the Dock Company, as I recall the testimony?

A. Yes, sir.

Q. Will you state what figure was given as the purchase price?

A. The Terminal Company sold its line east of the Omaha Crossing to Saunders to the Allouez Bay Dock Company for $2,829,259.82.

Q. Do you know how the Dock Company paid that?

A. The Dock Company gave to the Terminal Company ten-year 5% mortgage notes for that amount.

Q. What eventually became of the notes?

A. The Great Northern Railway Company purchased them in the early part of 1913 in connection with the purchase of the Dock property.

Q. Now can you tell us what this dock property actually cost the Great Northern Railway Company?

A. I don't seem to have that figure where I can lay my hands on it.

The Court: Have it for us at 2 o'clock.
Witness: Yes, sir.

Recess until 2 P. M.

Q. The last question was what did the dock actually cost the Great Northern, Mr. Martin?

A. The Great Northern paid $4,500,000 for the dock and assumed the depreciation which had accrued up until that time and which amounted, according to the books of the [fol. 153] Allouez Bay Dock Company, to about a million and a half dollars.

Q. You say it assumed depreciation; that doesn't mean the payment of any money?

A. No, it means that there had been set up on the books of the Dock Company a depreciation in the shape of a fund for renewing the docks when they reached the end of their life, which, for the wooden docks, may be ten, eleven or twelve years perhaps, and that the Great Northern took the docks in that depreciated condition and paid this four million and a half for them in the depreciated condition.

Q. Now, how did it pay the four million and a half?

A. The cost of the state of Wisconsin statutory fees for increasing capital stock at that time had been paid by the Great Northern, amounting to $3,910, and that was made a part of the payment. The ten-year coupon notes of the Allouez Bay Dock Company, which the Great Northern held and which I mentioned this morning, were turned over to the Allouez Bay Dock Company as part payment—

The Court: What was the amount of those?

Witness: In a total amount of $838,235.25, which was at the par value of the notes and accrued interest from the date of the previous interest payment, from August 1, 1912, down to March, 1913. Also there were turned over to the Allouez Bay Dock Company the remaining mortgage notes, of a face value of $2,086,364.58.

[fol. 154] Q. What mortgage notes were those, Mr. Martin?

A. The mortgage notes of the Allouez Bay Dock Company. The stock of the Allouez Bay Dock Company which had been sold to the West Missabe Land Company was

purchased by the Great Northern from that company and turned over to the Allouez Bay Dock Company at the book value of $600,000, and the balance of the four million and a half, of $971,490.17, was paid in cash.

Q. When was this cash payment made?

A. In April, 1913.

Q. The Great Northern, in April, 1913, owned the stock of the Allouez Bay Dock Company, did it not?

A. It purchased the stock of the Allouez Bay Dock Company from the West Missabe Land Company as I have just described and turned it over to the Allouez Bay Dock Company.

Q. To whom was this $971,000 in cash paid?

A. Paid by the Great Northern to the Allouez Bay Dock Company.

Q. Well, at that time, at the time of that cash payment, who owned the stock of the Allouez Bay Dock Company?

A. The transaction of purchasing the stock of the Allouez Bay Dock Company from the West Missabe Land Company was in April, 1913, and the cash payment was in April, 1913, I suppose at the same time, although I am not sure that it was on the exact date—that is, that those two transactions took place on the same day, but it was in the month [fol. 155] of April, 1913, in connection with the transaction of selling the property of the Allouez Bay Dock Company to the Great Northern Railway Company.

Q. It is a fact, then, that the Great Northern paid $971,000 in cash to the Allouez Bay Dock Company, the Allouez Bay Dock Company, as part of the transaction, virtually went out of existence, and anything it had, any money or property, came back to its stockholder, the Great Northern Railway Company?

A. No, sir; the disposition of the Allouez Bay Dock Company money at the time it went out of existence was in the shape of a dividend, which, under instructions that were given at the formation of the trust of the Iron Ore Properties on December 7, 1906, were to be paid to the trustees—both the dividends of the Duluth, Superior & Western Terminal and the Allouez Bay Dock Company, to the trustees of the Iron Ore Trust.

Q. But that terminated on December 31, 1912, did it not?

Mr. Countryman: What?

A. The sale was as of December 31, 1912, and these transactions were simply transactions that took place at a little later date in order to carry out that sale, which was actually a sale as of December 31, 1912, or January 1, 1913,—December 31, 1912, I would say.

Q. Isn't it also true that that payment of $971,000 put the Allouez Bay Dock Company in possession of money [fol. 156] which would not be distributed as a dividend but was a capital asset and would not be affected by the agreement which you have mentioned requiring the dividends of the Allouez Bay Dock Company to be paid over to the Great Northern Ore Trustees?

A. The Allouez Bay Dock Company disposed of the money that it had by making a dividend.

The Court: Whom did it pay the dividend to—actually pay it to?

Witness: The dividend was paid to the trustees of the Great Northern Iron Ore Properties.

Q. It was so actually paid, regardless of what may have been the rights of the parties?

A. Yes.

Q. Now as to the $600,000 stock purchased from the West Missabe Land Company, did the Great Northern actually pay $600,000 to the West Missabe Land Company for that stock?

A. Yes, sir.

Q. That was distributed, I take it, in dividends to the Great Northern Ore trustees too, was it?

A. All of the money of the Allouez Bay Dock Company was finally distributed in accordance with those instructions to the trustees.

Q. As to the mortgage notes of the Allouez Bay Dock Company, amounting to something over two million, did the Great Northern actually pay that amount of money for those mortgage notes?

A. Those mortgage notes had been separated as to holdings, and this first amount of a par value of $814,259.82 had gotten into the hands of the trustees or one of the com- [fol. 157] panies of which the stocks were in trust with the

trustees, and the Great Northern bought those notes from the trustees. $2,015,000, or the second item that I mentioned, had gotten into the hands of the Duluth, Superior & Western Terminal Company, and the Great Northern secured those notes by a surrender to the Terminal Company of all but five shares of its capital stock, or 19,995 shares of capital stock.

Q. Now as to the notes of the Allouez Bay Dock Company, amounting to $838,000, in round numbers.

A. That amount of $838,000 was made up of this $814,259.82 that I have just described, plus interest, so that I have already given you the division of the disposition of that amount.

Q. Oh, yes, I see. Now, you mentioned an agreement under the terms of which the dividends upon the stock of the Allouez Bay Dock Company were made payable to the Great Northern Ore Trustees; what, more fully, was that agreement and who were the parties to it?

A. The board of directors of the Great Northern Railway Company adopted a resolution at a meeting held November 14, 1906, directing the Lake Superior Company, Limited, to turn over to the trustees of the Iron Ore Trust the income of the Duluth, Superior & Western Terminal Company and of the Allouez Bay Dock Company until December 31, 1912.

Q. Who were the Great Northern Ore Trustees between 1906 and December 31, 1912?

[fol. 158] A. L. W. Hill, J. N. Hill, Walter J. Hill, and E. T. Nichols.

Q. Did they remain trustees during all the period that I have mentioned?

A. I think they were trustees during that period. There was a change, but I believe it was later. Walter Hill resigned, and Ralph Budd was elected in his place, but my recollection is that that was some little time after this date that you mention.

Q. And during that period Louis W. Hill was at all times an officer of the Great Northern Railway Company, was he not?

A. Well, I presume that he was an officer of the Great Northern, or perhaps, as I showed in the list yesterday,

there was a time that he was exclusively an officer of the Eastern Minnesota Railway Company.

Q. Was Mr. J. N. Hill during that period an officer of the Great Northern?

A. J. N. Hill was connected with the Great Northern at one time, but a long time ago severed his connection, and I can't give you the date of that, but it might have been, possibly, that he was connected with the Great Northern at the beginning of this, I couldn't say.

Mr. Lindley: I think it was before this, Mr. Martin, when he left the Eastern Railway of Minnesota and the Great Northern, I think he severed his relations in about 1903; that is my impression.

Witness: Well, I couldn't say what date it was that he left, but it was quite a long time ago.

[fol. 159] Mr. Ryan: We will have no objection to having Mr. Lindley correct that when the record comes up.

The Court: All right.

Mr. Ryan: Or, if your recollection is correct, we will let it stand that way.

Q. Mr. J. N. Hill, however, was a son of James J. Hill, who was either president of the Great Northern during this time or the chairman of the board of directors?

A. Yes, sir.

Q. Mr. Walter Hill was at no time connected with the Great Northern, was he?

A. He was with the Great Northern principally as a student in various capacities; he was for a time in the accounting department and traffic department learning different phases of the railroad business, and he was at one time on construction work which I think was not conducted by the Great Northern Railway Company but by some construction company.

Mr. Countryman: I think counsel means to inquire whether he held any office with the Great Northern.

Mr. Ryan: Why, I think I would like to have him state what his connection with the Great Northern was, if he had any, during the period between 1906 and December 31, 1912.

The Court: It wouldn't make a particle of difference

in this case that I can see, unless he was an official of the road, officer in some capacity; if he was just an employe, that wouldn't make any difference in this case.

[fol. 160] Witness: He was not an officer; he was not an officer of the Great Northern.

Q. He was during some part of the time connected with the Great Northern in the capacities you have mentioned?

A. Yes.

Q. Was he during all of that time, that you recall?

A. I couldn't say without looking up the records as to that.

Q. He too was a son of James J. Hill?

A. Yes, sir.

Q. And later Mr. Budd succeeded Mr. Walter Hill; during the period prior to December 31, 1912, Mr. Budd was an officer of the Great Northern?

A. Well, I know it was much later than that; it was subsequent to December 31, 1912. Walter didn't resign until after that date, I am positive of that, yes.

Q. Mr. Nichols during the period from 1906 to December 31, 1912, an officer of the Great Northern?

A. Yes, he is the New York representative of the Great Northern, and is now vice president and has been for some time, but I don't know whether his title was vice president at that time or not; if not, it was either secretary or assistant secretary and treasurer or assistant treasurer. He was the New York financial representative during that period.

Q. Now, as to the officers of the West Missabe Land [fol. 161] Company: Who were the officers of that company between 1906 and December 31, 1912?

A. I couldn't say from memory who might have been in that company, and I haven't any record here of the officers of that company.

Q. Do you know whether or not they were identical with the officers of the Lake Superior Company, Limited?

A. No, I couldn't——

Q. Or the Great Northern Ore Trust?

A. I couldn't say who they might happen to be, although they were probably somebody connected with the Ore Trust; that was the custom of officering the company.

Mr. Lindley: So far as the record is concerned, we are willing to state that, generally speaking, the companies the stocks of which were held by those trustees are largely officered by the trustees. That is not universal.

Mr. Ryan: Well, might we ask that you supply for the record the officers and directors of the West Missabe Land Company during this period and indicate whether or not they are connected with the Great Northern Railway Company.

Mr. Lindley: Well, if they were the trustees their relation would be as has been recited.

Mr. Ryan: I would like to have the record show.

Mr. Lindley: There is no objection to that being in the record.

The Court: Well, you furnish all of that information [fol. 162] for Miss Hess before she starts getting the record out.

Mr. Ryan: And we can put it in the form of an exhibit.

The Court: Yes.

Mr. Ryan: And attach it to the record.

Mr. Countryman: That is, the officers of the Missabe Land Company during the period from 1906 to 1912.

Mr. Ryan: Yes.

Q. Do you know, Mr. Martin, whether or not when the stock of the Allouez Bay Dock Company was transferred to the West Missabe Land Company by the Lake Superior Company at the direction of the Great Northern Company there was expressed any limitation on the manner in which that stock should be dealt with?

A. I don't know of any, but I don't know whether there was or not.

Q. You were to have some resolutions?

A. They were being copied.

Q. You found that there were such resolutions as I have described?

A. Oh, yes, I found that there were, and the copies are being made and will be brought just as soon as we can get them.

Mr. Ryan: I suppose it may be understood that when they come we will offer them as exhibits for the plaintiff as part of the record.

The Court: It may be so understood.

Q. And then I asked this morning about the lease from [fol. 163] the Terminal Company to the Dock Company?

A. I have a copy of that lease taken from our files; we didn't have time to make a new one of that.

Mr. Ryan: This lease or agreement dated June 1, 1903, between the Duluth, Superior & Western Terminal Company and the Allouez Bay Dock Company, the original of which Mr. Martin produces, I take it a copy of this will be supplied——

Witness: This is not an original; this is a copy.

Mr. Countryman: Can't you read into the record the pertinent provisions and avoid making more exhibits? I assume there is some particular thing that you consider material.

Mr. Ryan: It will take me a little time to read it to see what will be material.

Mr. Countryman: You can consider it read into the record, if you like, and then the stenographer can just later copy it into the record.

Mr. Ryan: That will be satisfactory. Plffs. Ex. M. is offered in evidence and made part of the record.

The Court: Received.

Q. Mr. Martin, can you tell me how long this agreement Ex. M remained in force?

Mr. Lindley: Until the sale of 1908.

A. Until August 1, 1908.

Q. That was the date of the sale of the property?

A. The date of the sale of the properties.

[fol. 164] Q. Now, Mr. Martin, referring to this lease, and particularly this portion of it requiring the Dock Company to pay to the Terminal Company on account of Dock No. 1 the sum of $1,666.67 each month until the said dock shall be rebuilt or until the payments so made shall aggregate the sum of $151,666.66, do you know why that provision was made in reference to Dock No. 1?

A. I can only surmise from the general course of that sort of business, and as I also know that Dock No. 1 was

a small, antequated dock which it was understood would have to be rebuilt before a great while, and that the idea was to establish one of those funds for renewal of which I spoke a little while ago, so that when it came time to renew the dock there would have been accumulated and set aside out of the income from time to time an amount of money which would take care of the rebuilding of the dock up to that amount, which, I presume, was the amount that was set as the value of that dock at the time it was taken over.

Q. Now, as to the next provision on account of Dock No. 2 the sum of $3,622,55 in each month until said dock shall be rebuilt or until the payments so made shall aggregate the sum of $519,835.63.

A. I suppose that was the same thing, was for the purpose currently of supplying the fund with which to rebuild or assist in rebuilding when the time came that that was necessary to do.

Q. And it is also true in your judgment that represented what was then considered the value of Dock No. 2?

[fol. 165] I think the figures that I gave for Dock No. 2 this morning were very much larger than that for the total cost. I don't know why it was set at that particular figure, if that is the question.

Q. And then the next provision was "on account of Dock No. 3 now in course of construction, one one-hundred-and-eightieth (1/180) of the actual cost thereof, to be ascertained and agreed upon, in each month after the same shall have been completed and gone into operation, until said dock shall be rebuilt, or until the payments so made shall aggregate the total cost of said dock." That, I take it, is self-explanatory.

A. That seems to be the same principle that I was explaining for the other items.

Q. Now, Mr. Martin, did you find anything upon those tax reports about which inquiry has been made?

A. Our Tax Commissioner has made a search of his records to determine how the assessments were reported, if they were reported, and he finds that they were not reported by the Railway Company or by the Dock Company.

Q. They were merely assessed by the proper taxing authorities without any report by you?

A. Yes. This statement which he brings was made some time ago as representing the situation, and in 1906 the taxing authorities showed the Great Northern and the Allouez Bay Dock Company separately in their preliminary assessment, but combined the amount in their final assessment, and then they used that amount plus additions to [fol. 166] the property in the subsequent years. But that was their figure and their combination and not anything that was done by the tax department of the Great Northern in the way of making a report to the Tax Commissioner of Wisconsin.

Q. Now, Mr. Martin, during this period involved in this case the Great Northern Company owned, used and operated a merchandise dock at Superior, did it not?

A. The Great Northern owned the merchanidse dock from the time that it bought the property of the Eastern Minnesota on July 1, 1907, but operated that dock from the time that it leased the property of the Eastern Minnesota on May 1, 1902.

Q. And it continued to operate that dock in connection with its railway line up until December 31, 1912, at least?

A. Yes, sir.

Q. What was the practice of the Great Northern in connection with that dock in respect to delivering freight coming to that dock in its cars to the boats?

A. It was a warehouse on the dock, constructed for the purpose of making the interchange of freight from the cars to the boats.

Q. In fixing the rate to be charged by the Great Northern for freight moving over the Great Northern, did it prescribe a rate that covered the delivery of its freight into the boats?

A. I couldn't say for sure; I haven't seen those tariffs [fol. 167] for a long time but I suppose that it covered the delivery to the boat.

Q. You know, do you not, Mr. Martin, that during all of this period involved in this case it was the custom and practice and usage of the Great Northern Railway Company and of every other railway having docks at the Head of the Lakes to prescribe a rate for hauling goods at which

the goods hauled would be delivered on to the boats in the lakes?

A. I couldn't say just where the point of delivery might be; it might be on the dock within reach of the boat's lines. I don't know just where that point of delivery was, whether the railway company actually handled on to the boat or whether they handled to where the boat could reach it; I couldn't say without looking up the traiffs on that.

Q. You do know, do you not, Mr. Martin, that as a matter of custom and usage applicable to your line and to all other lines in Minnesota, freight of any kind carried by you went on to the boats at the Head of the Lake without any other charge by you or such other lines than rate for transportation prescribed in your tariff and in their tariffs?

A. I wouldn't say positively as to that. I know that in times past we have made many bills against the boat lines for certain services, but I don't remember what those services were exactly, I couldn't tell without having that looked up.

[fol. 168] Q. My inquiry was in respect to the shipment.

Mr. Lindley: Of course, there were no charges except charges put in the tariffs, because there might be dockage charges or warehouse charges, but they would all be made in the tariff.

Witness: Well, that is what I said a moment ago, that I can't tell without the tariff just exactly what the particular charge of the railway company covered; I can't say whether that covered delivery on to the boat or delivery on to the dock within reach of the lines of the boat, or perhaps at some other point, that tariff would designate, but I don't remember.

Q. Well, do you know of any charge made by the Great Northern or by any other railway company for handling merchandise at the docks?

Mr. Lindley: At any place?

Mr. Ryan: At any place at the Head of the Lakes.

A. I don't know more closely than I have already stated, from my memory.

Q. Well now, Mr. Martin, can you answer this question: Do you know whether or not during the period of ownership of the merchandise dock at Superior the Great Northern Company in reporting its gross earnings for taxation made any deduction from its earnings on account of any charges made at the Great Northern merchandise dock at Superior?

A. As far as my memory serves me I do not know of any such deductions.

[fol. 169] Q. Now, Mr. Martin, going to another point: Yesterday you gave us the valuation of the Great Northern Ore Lines both in Minnesota and Wisconsin, and your valuation of the docks; can you tell us what the cars and equipment of the Great Northern Company used in the carriage of ore was during the years involved in this proceeding?

Mr. Lindley: During all the years or the years to which he has testified to yesterday? He only covered the years from 1909 to 1912 yesterday on valuation—1908 to 1912.

Witness: 1908 to 1912, yes.

Q. Have you them for the years 1901 to 1912?

A. I have only the figures from 1908 to 1912 for any of this. It happened that these were compiled for another purpose and so I could get them without delay, and so I have only those years.

Q. You might give us those, then.

A. For the year 1908 this statement shows the investment in equipment to be $5,705,042; for 1909, $5,701,088; 1910, $6,726,037; for 1911, $7,217,214; for 1912, $7,178,051.

Q. Now, can you tell us approximately what the ratio of cost of operation to income was on the Great Northern Ore Lines and from the mines to the Omaha Crossing during that period from 1901 to 1912?

A. Well, I haven't got those percentages in my mind.

Q. You haven't them?

A. No, I haven't got them.

[fol. 170] Q. Can you give us any approximate figure?

Mr. Lindley: Well, we wouldn't want any guesswork on that; take about a month to work that out.

Q. Well, can you give us the ratio of cost of operation of the dock income during those years?

A. No, I haven't those figures in my mind.

Q. Can you tell us generally whether or not the ratio as between cost of operation and income at the dock compare appreciably with the ratio of the cost of operation of the Ore Lines to your earnings?

A. Do you mean whether the cost of operation of the dock property compared to its income was comparable with the cost of operation on the Ore Lines of the Railway Company compared to its income, meaning as to whether it might be more or less, or——

Q. That is it exactly.

The Court: That is what it means.

A. I would think that probably the Dock Company's ratio was less than the Railway Company's ratio.

Recross-examination.

By Mr. Lindley:

Q. Mr. Martin, I don't think there has been a description of the yards just west of the Omaha Crossing.

A. The yard in which the ore is received and the ore trains broken up and classified so as to move on to the dock [fol. 171] is a very large yard. This blueprint which I have is the nearest one in the files showing the situation in 1912.

Q. Describe in a general way what it shows.

A. There is nearest to Saunders a combination of yards called the in-bound yard and the outbound yard, the one being for the purpose of running in the loaded trains as they come from the mines, and the other one for the purpose of making up the trains of empty cars to take out to the mines. The in-bound yard has fourteen tracks besides the main running track, of which seven are between 3,400 feet and 3,876 feet in length, and then there is a second combination of the seven other tracks which are between 3,400 and 3,500 feet in length. The out-bound yard has nine tracks, the length of which does not seem to be entered on the print, but which are about the same length as the second set of tracks in the in-bound yard. Then from the in-bound yard there are lead tracks and crossovers which run into

what are called the classification yards, and there are fifteen or sixteen tracks in classification yard No. 2, the lengths of which are not given, but which are fairly long tracks as compared with the ones in the other yard; and then classification yard No. 1 has also fifteen tracks which are somewhat longer than those that are in yard No. 2. In addition to that there are the buildings which are necessary for a railroad terminal, consisting of a roundhouse, a storehouse, including oil houses and sand houses and the buildings gen-
[fol. 172] erally that are necessary for taking care of locomotives between one trip and another, water tanks, also scales on which the ore is weighed, and the cinder pits and turntables and various appurtenances that go with the regular railroad terminal.

Q. Yesterday you testified with respect to the use of the docks by other railroads; would the docks have handled the period in question anybody's ore that might have been tendered for handling?

A. Yes, they would have handled any ore that was offered for handling over the docks.

Q. Do all the railroads that reach Superior and Duluth at some point connect with the Great Northern in the vicinity of those cities?

A. Yes, there are connecting tracks between all railroads, and at Superior that is peculiarly well taken care of through the terminal company called the Lake Superior Terminal Transfer Company.

Mr. Lindley: You referred yesterday to the transportation of ore from the Missabe Range over the Duluth, Missabe & Northern in connection with the Great Northern. I offer in evidence as Defts. Ex. 1 a traiff, I. C. C. No. 358, G. T. D. No. 1447, entitled, "The United States Railroad Administration, the Director General of Railroads, Duluth, Missabe & Northern Railroad in connection with Great Northern Railroad, appointment. Notice No. 3.

Mr. Ryan: What is the date of it?

[fol. 173] Mr. Lindley: The date of the tariff is July 17, 1919. I will have to have copies made and furnished you later.

Mr. Ryan: I don't see the materiality of it.

The Court: I don't either, in 1919.

Mr. Lindley: We simply offer it in connection with the examination brought out yesterday by the other side with respect to this same transaction. They brought out yesterday by this witness the fact that this ore has been handled in this manner, and we propose to offer in connection with it the division sheet showing the division of the rate as between this outside railroad and the Great Northern for the handling of ore from the Missabe Range to and over the dock. We have here the division sheet which shows the division as between the Missabe road and the Great Northern for handling ore hauled by the Missabe to Saunders, there delivered to the Great Northern and from there hauled by the Great Northern from Saunders to the dock, showing that the Missabe received seventy-five per cent of the line haul rate, and the Great Northern received twenty-five per cent of the line haul rate for handling from Saunders to and over the dock.

Mr. Ryan: Objected to as irrelevant and immaterial.

The Court: I can't quite see the materiality of it, Mr. Lindley.

Mr. Lindley: Well, I don't myself, your Honor, in view of the fact that the question of the reasonableness of this division hasn't arisen in this suit,—couldn't arise. The [fol. 174] question is whether or not it is a division at all. In other words, this is not an action by the State charging that the Great Northern has accorded to these other companies an unreasonable division.

The Court: No, I take it, under the evidence, the Court will simply find that there was such a division; there is no evidence whatever that it is unreasonable, so that wouldn't come into the case at all.

Mr. Lindley: I only offer it in connection with that movement to show that a carrier is a common carrier there, carrying in connection with other roads as well as the Great Northern.

The Court: Well, I will tell you what I will do; I will receive it——

Mr. Ryan: We do dispute the reasonableness of it.

The Court: No evidence that it is unreasonable.

Mr. Ryan: No, but we insist that the evidence is such as to require the Great Northern Company to show that it is reasonable .

Mr. Lindley: That is not an issue in the pleadings.

The Court: No, I don't see it that way. I think I will allow this to go in. The is no jury here to be misled, and if it has no bearing on the matter I will disregard it. Received with that understanding.

Q. Mr. Martin, you enumerated yesterday the different terminal charges with respect to interstate shipments which [fol. 175] you say are eliminated in pro-rating the revenues received for making tax returns; do you want to include any other such charges?

A. I thought of the charges on account of dockage which I didn't mention yesterday along with switching, storage and demurrage.

Q. Dockage and wharfage charges?

A. Dockage and wharfage charges.

Q. As an illustration: If a shipment moved from Minneapolis to Seattle, there handled over the wharves, and if there be wharfage charges for handling over the wharves at Seattle, that charge is deducted from the total revenue collected on account of the shipment, and then the balance is pro-rated for tax purposes as between Minnesota and the balance of the distance according to mileage?

A. No.

Q. Then will you state?

A. I think that dockage is a separate charge, and, like storage and demurrage and switching, covered by its own tariff, and if collected at Washington it would be assigned to Washington as a local item, it would be localized, and in that case Minnesota wouldn't get any proportion of it either as an earning or as a deduction, whichever way the charge might go.

Q. That is what I thought I stated. Mr. Martin, the Eastern Railway Company of Minnesota and the Great Northern Railway Company during all the period in controversy here, when they were operating the properties in [fol. 176] question, were required to report their gross revenues, were they not, to the Interstate Commerce Commission, under the rules and regulations of that Commission prescribed to ascertain gross revenues?

A. Yes, sir.

Q. Did either the Eastern Railway Company of Minnesota or the Great Northern Railway Company ever include in their gross revenues so reported and kept according to said regulations that portion of the revenue derived from the transportation of ore which was assigned as a division to the Duluth, Superior & Terminal Company and later to the Dock Company?

A. No, sir.

Q. What?

A. No, sir, that was never reported as earnings of the Great Northern or the Eastern Minnesota Railway Companies.

Q. When the Duluth, Superior & Terminal Railway Company reported to the I. C. C. it did report as its gross revenues, did it not, the revenues which are assigned to it out of the transportation of ore?

A. The Duluth, Superior & Western Terminal Company did not make reports to the Interstate Commerce Commission.

Q. It ceased to operate before those reports were required, I suppose. I will ask you, Mr. Martin, if those same rules and regulations of the Interstate Commerce Commission do not require operating railway companies to keep an [fol. 177] account of and to report to the Commission all operating expenses?

A. Yes, sir, that is required.

Q. Yes. Did either the Eastern Railway Company of Minnesota or the Great Northern Railway Company ever report as operating expenses that proportion of the revenue derived from the transportation of ore and allocated to the Terminal Company and later to the Dock Company?

A. No, sir.

Q. Have those reports ever been questioned by the Interstate Commerce Commission as respects that item?

Objected to as incompetent, irrelevant and immaterial.

Sustained.

Q. Mr. Martin, you were questioned this morning with respect to the basis of divisions as between railroads participating in what are known as interline hauls; just to clear the record, all freight moving over two or more lines does not necessarily move under through rates, does it?

A. No, sir. I so testified this morning.

Q. That is, some of it moves on what is known as a combination of local rates?

A. Well, it moves on billing of each railroad company hauling it, which billing would carry the local rate for each of those companies.

Q. Aside from the mere billing isn't it true that frequently there are not through rates?

A. Yes, sir.

Q. Between distant points, and when a shipment orig- [fol. 178] inates at a given point to go to a distant point, between which points there is no through rate, it moves on what is known as a combined local rate?

A. Yes, sir, if there is no through rate that is the way it has to move.

Q. In the event there be no through rate, then each road gets what is known as its local rate, does it not?

A. Yes, sir.

Q. Now, is it not true that in the division of through rates as between railroads generally that short line originating roads and short line terminal roads are always accorded a larger per centage than a mileage haul, and usually that there is a minimum, that such roads get no less than twenty-five per cent of the revenue derived from the shipment?

A. Yes, that is correct. The exact minimum I am not sure of, but I think that that is correct. The rest of the statement is so.

Q. In determining the proportion in excess of the usual or customary minimum what factors are of importance?

A. One of the things that I think I mentioned this morning is the relative value or size of the physical property used, as, for instance, if one of the roads was not obliged in its portion of the shipment to use any expensive terminals and the other road was, that that fact would be taken or might be taken into consideration as one of the [fol. 179] reasons for giving the road with the expensive terminals a larger proportion than a mileage pro-rate.

Q. Does the fact that the properties of a terminal company or of a bridge company may be at an important gateway make any difference?

A. Yes. There are a number of so-called bridge arbitraries or allowances that are made for a bridge and deducted from the rate before the rate is pro-rated between the two companies, the bridge arbitrary going to the bridge company, if that is a separate company, or to the line haul carrier which may happen to own it.

Q. Will you please illustrate that?

A. All of the rates from the Pacific Coast to points east of the Missouri River, like Chicago or points east, are governed by the original Union Pacific charge which was made when the Union Pacific was the only company from the Pacific Coast through to the east, amounting to five cents a hundredweight, as I remember it, for the bridge at Omaha, and that same allowance was taken by the Northern Pacific when it built through, although it really did not have a bridge at Omaha; and the same allowance was taken by the Great Northern when it built through, although it actually did not have a bridge. For example, if there was a shipment from the Pacific Coast—Portland—by the Union Pacific line to Spokane, and then moved east over the Great Northern, we will say the rate was a dollar, there would be five cents first taken out before the rate was divided, leaving ninety-five cents to divide, and if that was [fol. 180] twenty-five per cent for the Union Pacific and seventy-five per cent for the Great Northern, after that pro-rate had been made the five-cent bridge arbitrary would then be added to the Great Northern revenue.

Q. Confining yourself to the Omaha bridge for a minute on that custom and practice, the Union Pacific, as the owner of the bridge at Omaha and engaged in transportation which moves over its line and the lines of connecting carriers, first deducts, generally speaking, five cents a hundred-weight on account of the use of that bridge which it owns, and then it divides the balance of the revenue received from such shipments as between itself and the connecting carriers upon some basis of division agreed upon?

A. Yes, sir.

Q. And that is the general practice throughout the United States where roads own as a part of their systems important bridges over rivers?

A. Yes, sir.

Q. Such bridge arbitrary accruing to the Great Northern, as an illustration, on account of a bridge outside of Minnesota would not be included, would it, in the returns of the Great Northern for gross earnings tax?

Mr. Ryan: Just a moment before you answer that. You assume that there are some such bridge arbitraries outside of Minnesota that the Great Northern——

Mr. Lindley: He has already testified to that.

[fol. 181] Mr. Ryan: I don't understand that he has testified.

Witness: I said that the Great Northern, following the Union Pacific system, although it did not actually have a bridge, had the bridge arbitrary carried in its rate. But answering your question, Mr. Lindley, that bridge arbitrary is considered a freight earning and thrown in with the earnings secured through the pro-rate, and then the total amount is apportioned among the various states in the same way as all other interline shipments are apportioned.

Q. But if the arbitrary was on account of a bridge in Minnesota, would Minnesota get the tax on the whole amount, or would it be thrown into the pro-rate, as you suggest, of the whole amount?

A. That sort of deduction is made simply for the purpose of getting the lesser amount to the pro-rate, and then the amount received from the pro-rate plus the arbitrary is all thrown into the freight earnings and apportioned; so that Minnesota would get only its proportion. That is, it is not a localized item of which Minnesota would get hundred per cent, like the switching or demurrage.

Q. Mr. Martin, I want to make it clear about the creation of the Great Northern Iron Ore Properties, so-called. In 1906 the Lake Superior Company, Limited, had in its possession, under the agreement which has been introduced in evidence here, various stocks of various companies, including a number of mining companies?

A. Yes, sir.

[fol. 182] Q. Is that right? In that year, pursuant to directions given by the Great Northern Railway Company and said agreement, the Lake Superior Company, Limited,

turned over the stocks of various land companies or mining companies to the four trustees whom you named a while ago, did it not?

A. Yes, sir.

Q. To be held for the benefit of the shareholders of the Great Northern Railway Company of record as of a certain date; is that right?

A. Yes, sir, December 7, 1906.

Q. The interest of the shareholders was to be evidenced by so-called beneficial certificates issued to the shareholders as of the date you gave?

A. Yes, sir.

Q. Those beneficial certificates were transferable on the books to be kept by the Trustees, were they not?

A. Yes, sir.

Q. From that date until now the segregation has been complete, has it not, as between the properties held by the Trustees for the shareholders as of that date and the Great Northern Railway Company?

A. Yes, sir.

Q. The Great Northern Railway Company has nothing whatever to do with the management of the so-called Great Northern Iron Ore Properties?

A. No, sir.

Q. The Trustees in the management of the Great Northern Iron Ore Properties are responsible solely as trustees [fol. 183] under the trust agreement for the benefit of the holders of their beneficial certificates?

A. Yes, sir.

Q. The Trustees in no wise are amendable to the board of directors or the shareholders of the Great Northern Railway Company?

A. No, sir.

Q. At the time of the creation of the trust, by appropriate action, the Great Northern Railway Company directed, did it not, that the Lake Superior Company, Limited, which still retained the shares of stock of the Allouez Bay Dock Company and the Duluth & Superior Terminal Company, to turn over to the trustees, for the benefit of the beneficial holders of the trustee certificates, all income received from said stocks until the 31st day of December, 1912?

A. Yes, sir.

Q. So that the income which accrued to the Duluth & Superior Terminal Company and the Allouez Bay Company between 1906 and 1912, December 31st, accrued to those certificate holders and not to the Great Northern Railway Company or to the shareholders of the Great Northern Railway Company?

A. That is correct.

Q. Mr. Martin, you testified this morning that the tariffs which the plaintiff has introduced in evidence here were only the tariffs of the Great Northern and that it did not appear on the face thereof that the Duluth & Superior Terminal Company or the Dock Company joined.

[fol. 184] A. Yes, sir, I so testified.

Q. Is it is not true that until the decision of the United States Supreme Court in the year 1911 or 1912, holding that terminal companies situated similarly to the Dock Company here were subject to and amenable to the regulation under the Interstate Commerce Commission Act and were required to file tariffs, that the Allouez Bay Dock Company and most other terminal companies of the United States contended that they did not have to comply with the rules and regulations of the Interstate Commerce Commission or the rules and regulations pursuant to that Act?

A. I understand that is so of the Allouez Bay Dock Company, and as far as I have known of other companies, that is true of them.

Q. In other words, it was their contention that while they were a common carrier of ore and any other traffic that could be handled over their docks, that the Interstate Commerce Act was so worded as not to subject terminal companies of the character of the Dock Company to the regulation?

A. The Allouez Bay Dock Company so contended, yes, sir.

Q. And that the Dock Company was privileged to make any arrangement which it saw fit with any connecting carrier with respect to the charges that would be imposed upon traffic being handled thereover, and to make any division which it saw fit with connecting carriers with respect to said charges?

[fol. 185] A. That was the position that was taken by the Dock Company, yes, sir.

Q. You were asked this morning with respect to a shipment moving into Minneapolis which had to be switched to another railroad, where the switching charge was absorbed by the Great Northern; is it not a fact that when the Great Northern moved a shipment, for illustration, from another point in Minnesota to Minneapolis, destined for delivery upon the tracks of a connecting carrier, which connecting carrier gets a switching charge for handling, and the Great Northern absorbs that switching charge, that the Great Northern reduces the amount of the line haul charge which it receives by the amount of the switching charge which it has to absorb, and that the connecting carrier reports as its gross revenue the amount of the switching charge which it gets?

A. That is what I have testified to this morning and was just a little uncertain, and so I had it verified during the noon hour. I went to the freight receipts office to see about that, and was told that my testimony was correct this morning.

Q. Well, was it in line with what I said?

A. In line with your question; that is, that the amount so absorbed is deducted from the freight earnings, but that same amount being collected by the other carrier is reported as a localized charge, and one hundred per cent goes into the earnings of that company as reported to the state of Minnesota for gross earnings tax.

[fol. 186] Q. Was the stock of the Missabe Land Company turned over to the trustees of the so-called Great Northern Iron Ore Properties?

A. Yes, sir; the West Missabe Land Company, Limited, you mean?

Q. Yes, West Missabe Land Company Limited.

A. Yes, sir.

Q. So that from 1906, the date of the creation of that trust, until now, the trustees of the Great Northern Iron Ore Properties have been the owners of the stock of the West Missabe Land Company, Limited?

A. That is correct, excepting that in saying until now—the West Missabe Land Company itself went out of existence at the expiration of its Michigan charter, and was re-

organized under the state of Minnesota laws as the Grant Iron Mining Company.

Q. Its properties were all turned over to the Grant Iron Mining Company?

A. Yes, sir.

Q. The trustees to take the property, the stock of which Grant Company is all held by the trustees?

A. Yes, sir.

Q. Throughout the period here involved the Dock Company from the date of its acquisition and ownership of the docks paid the taxes thereon either directly or by prorating with the Great Northern on the total amount of taxes paid in Wisconsin?

[fol. 187] A. Yes, sir, it paid its own taxes.

Q. You were asked with respect to the dock and wharf charges; in a general way isn't it true that at almost every important seaport in the United States all traffic moving over docks or wharves pays a dock or wharfage charge?

A. I think that is so, yes, sir.

Q. Mr. Martin, I think perhaps the pleadings admit it, but the answer of the defendant sets up that during the years involved herein the Great Northern and the Eastern Minnesota and the other subsidiaries of the Great Northern made their returns under the gross earnings tax law, and that the aggregate amounts paid during said years were as stated in the amended answer. I think you are able to say that those figures are correct.

A. Well, each company made up its own returns from its own books.

Q. Yes.

A. I don't know as I follow you further than that.

Q. And that the total amounts paid by all the companies aggregate the amounts paid in the several years, as set out in the answer; I think the answer admits that.

Mr. Ryan: The answer admits it.

A. Yes, I understand that, yes, sir.

Q. You were asked this morning as to whether or not the Examiners for the state when examining the accounts of the company would know whether or not the charges for hauls over the Great Northern and any subsidiary of the [fol. 188] Great Northern had been divided as between the

two companies; in every instance where a subsidiary of the Great Northern received a division, that company was also an operating company, was it not?

A. Yes, sir.

Q. And that company reported and included in its gross revenues its proportion of any interline haul with the parent company?

A. Yes, sir.

Q. And so reported to the Tax Commission?

A. Yes, sir.

Q. So that the Tax Commission in examining the report of all Great Northern companies, so-called, were in a position to ascertain what proportion each of them received and each of them reported?

A. Yes, sir.

Q. Mr. Martin, as a matter of fact, the subsidiary companies of any other railroad company operating in Minnesota, such as the Minneapolis Eastern, made their own returns under the gross earnings tax law, did they not?

A. The Minneapolis Eastern—I don't know from ever having seen the reports, but I haven't any doubt but what they do make exactly the same reports as any other company.

Q. The Minneapolis Eastern being a subsidiary of other companies.

A. Yes.

[fol. 189] Redirect examination.

By Mr. Ryan:

Q. Mr. Martin, the Dock Company didn't make any reports to the Interstate Commerce Commission, did it, of its earnings?

A. As I stated, there was for some little time a question as to whether the reports should be made or not, and that question did not come to a head until 1912. The Interstate Commerce report for 1912 for the Allouez Bay Dock Company was prepared, but never was filed.

Q. Now, it appears, Mr. Martin, that by direction of the board of directors of the Great Northern Railway Company the dividends on the Allouez Bay stock and the stock

of the Duluth, Superior & Western Terminal Company were to be paid to the Great Northern Ore Trustees; did the Great Northern Ore Trustees pay anything to the Great Northern for that privilege or undertake to do anything for the Great Northern in payment for those dividends?

A. The trust which was formed and effective as of December 7, 1906, received from the Lake Superior Company, Limited, by direction of the Great Northern Railway Company, the stocks of these various mining companies, and at that same time the direction was given that the dividends from the Duluth, Superior & Western Terminal Company and the Allouez Bay Dock Company should be paid to the trustees until December 31, 1912. On the date of the for- [fol. 190] mation of the trust, when the certificates of beneficial interest were issued, they were issued share for share with the Great Northern stock. That is, there was a million five hundred thousand shares of Great Northern stock and there were a million five hundred thousand shares of certificates of beneficial interest issued. At that moment the beneficial ownership of the Great Northern Railway and the certificates of beneficial interest were identical, and, consequently, the interests were identical. I don't know whether that answers what you have in mind, but——

Q. I think it does, Mr. Martin. In other words, it was considered by the board of directors of the Great Northern Railway Company when they directed these dividends to be paid to the Great Northern Ore Trustees that that was equivalent to directing that these dividends be paid immediately and directly to the stockholders of the Great Northern Railway Company, did they not?

A. If the stockholders of the Great Northern Railway Company had each one of them retained his shares and had also retained his certificates of beneficial interest that would have been true. Of course, very soon somebody sold the certificates of beneficial interest, and somebody else sold shares of stock of the Great Northern Railway Company, and from that moment the divergence began between the ownership of the stock of the Great Northern Railway and the certificates of beneficial interest, so that that is widely divergent at the present time.

[fol. 191] Q. Yes, but outside of the fact that it was contemplated, recognized, that those dividends coming to the

Great Northern Ore Trustees would go to the stockholders of the Great Northern Railway Company, there was no reason or justification for assigning those dividends to the Great Northern Ore Trustees?

A. Well, the idea undoubtedly was to assure to the Ore Trustees for that period of time that much income which would be distributable to the holders of the certificates of beneficial interest.

Q. Well, unless it was considered that those dividends were going to the Great Northern stockholders there was nothing to account for the provisions that those dividends should be assigned to the Great Northern Ore Trustees, was there?

A. The Great Northern stockholders were willing to have the division made in that way and ratified the action of the board of directors in making such a distribution or disposition of those dividends.

Q. Yes, it was put up to the Great Northern stockholders themselves to say whether or not they would continue to receive from the Ore Trustees the dividends payable on the Allouez and Terminal stock, was it not, by that arrangement?

A. The stockholders ratified the arrangement which was made to give the dividends of these companies over to the Trustees.

Q. Yes, so that it was put in their power, when the ore certificates were delivered to them, to say whether they would continue to receive those dividends during that period [fol. 192] or not, by holding the ore certificates or disposing of them as they saw fit?

A. Well, that action was taken, that you have reference to, to date some few weeks prior to the actual date of the formation of the trust, so that it was the stockholders of record as of that date that made the decision and not the stockholders at some other date after the certificates had been distributed.

Q. Well, wasn't this one of the ideas, Mr. Martin: it was the purpose in assigning to the Great Northern Ore Trustees those dividends for a fixed period of six or seven years because that assignment would insure to the Great Northern Ore Trustees for a fixed period of six or seven

years a large and a certain income which would in itself give an immediate salable value to the Great Northern Ore certificates and enable the stockholders then of record to discount the value of those dividends during those years?

A. No, I——

Mr. Lindley: If you can answer that question.

Mr. Ryan: Well, he can say that he can't if he can't.

Witness: No, I can't say that that was so in the way that you put it. The effect, of course, was to give the trustees the dividends as they were declared during that period of time. That is as far as I could say in answer to your question, I think.

Q. Well, a fixed large income was guaranteed to the Great Northern Ore Trust by that arrangement, was it not, for a period of six years?

[fol. 193] A. There wasn't any guaranty further than that the trustees would get whatever dividends were declared during that period of time.

Q. Well, the arrangements which have been disclosed here were such that it was certain to follow, was it not, that a large income would accrue to the Great Northern Trustees from those stocks?

Mr. Lindley: I object; counsel can argue that from the record.

Objection sustained.

Q. Now, just to make it clear when we do come to argue it from the record, Mr. Martin, I will ask you more pointedly the question which I originally asked. The Great Northern Ore Trustees gave to the Great Northern Railway Company nothing in return for the assignment of the dividends of the Allouez stock and of the Terminal stock to them for that period?

A. No, they didn't give anything.

Mr. Lindley: Didn't give anything for that or the stocks, either, did they?

Mr. Ryan: That makes it clear. That is all.

Witness: Mr. Ryan, the resolution that you asked for is here.

Mr. Ryan: Those are run together, and I suppose they may be introduced as a single exhibit. I offer in evidence Plffs. Ex. N, being two resolutions previously referred to in the testimony.

The Court: Received.

Mr. Ryan: In order to complete the record, may it please the Court, plaintiff will offer Ex. O in connection with Mr. [fol. 194] Martin's testimony, that being the trust agreement between the Lake Superior Company and Louis Hill and others; that is the Great Northern Ore Trust agreement.

Mr. Lindley: Subject to verification.

The Court: All right.

Mr. Ryan: Mr. Martin has a list of employes of the West Missabe Land Company about which we inquired and which he was to supply.

The Court: All right.

Q. State, Mr. Martin, who were the officers or the West Missabe Land Company during the period commencing with 1906 and ending with December 31, 1912.

A. In 1906 the officers of the West Missabe Land Company, Limited, were Louis W. Hill, chairman; Robert I. Farrington, vice chairman and treasurer; J. H. Gruber, secretary. In 1907, L. W. Hill, chairman; Walter J. Hill, vice chairman; R. I. Farrington, treasurer; F. S. Dalrymple, secretary and assistant treasurer. 1908, L. W. Hill, chairman; Walter J. Hill, vice chairman; R. I. Farrington, treasurer; J. H. Gruber, secretary and assistant treasurer. In 1909, L. W. Hill, chairman; Walter J. Hill, vice chairman; E. T. Nichols, treasurer; J. H. Gruber, secretary and assistant treasurer. 1910 and 1911 were the same as 1909. 1912, L. W. Hill, chairman; Walter J. Hill, vice chairman; J. H. Gruber, secretary and treasurer. I was also to find out about J. N. Hill; you asked me to find out about J. N. Hill.

Q. Yes.

[fol. 195] A. J. N. Hill resigned from the Eastern Railway Company of Minnesota as vice president and director in 1899, and as director of the Great Northern Railway Company on May 19, 1905.

Q. And was not thereafter connected with the Great Northern Railway Company?

A. That is correct.

Q. I don't recall, Mr. Martin, whether or not you have previously testified to the connection of Mr. Dalrymple with the Great Northern, if any; you have as to all of these other men.

A. Mr. Dalrymple was in the Iron Ore offices either as assistant to the chairman or assistant to the secretary and treasurer; he was an employe in the Iron Ore offices.

Q. He was not connected with the Great Northern Railway Company at any time during this period, so far as you know?

A. Well, he might have been connected, the same as Mr. Gruber was, in the way of some incidental services, such as in dealing with the lands in northern Minnesota—I mean the Great Northern lands in northern Minnesota, or some such incidental service which was relatively unimportant, but not directly in connection with the operations of the railroad companies.

Recross-examination.

By Mr. Lindley:

Q. I understood you to say, Mr. Martin, in response, I think it was, to an inquiry of the Court (I think perhaps you have answered the question) that the only substantial [fol. 196] revenue which was received by the Dock Company from the time of its organization until the period of the time involved here was the proportion of the ore rate, its division paid to it, as you have stated here, and that the amounts paid on account of its division of the ore rate during that period were the amounts set out in the amended answer.

A. Yes, the revenue, with the exception of a very few dollars, was from the iron ore traffic.

Q. And were the amounts paid to it out of its division of the iron ore rate as set out in the amended answer?

A. Yes, sir.

Q. And that is also true of the Terminal Company prior to the organization of the Dock Company?

A. Yes, sir.

HERBERT C. VARNEY, sworn on behalf of plaintiff, testified:

By Mr. Ryan:

Q. Mr. Varney, you are now and have been for a great many years last past connected with the Public Examiner's office of the state of Minnesota?

A. Yes, since about November, 1907.

Q. Prior to that time what was your occupation?

A. Well, just previous to that I was connected with a mining company in Wyoming.

Q. For how long?

A. For two or three years.

[fol. 197] Q. Prior to that time what was your occupation?

A. And then for two or three years I was a clerk in the Great Northern offices.

Q. Now, since 1907 what has been your work? What duties have you performed in your employment with the Public Examiner of the State?

A. Well, in the first place in a clerical capacity in connection with the railway examinations, and then later on as assistant examiner, and for the last two or three years I have made most of the examinations myself. Occasionally I have been on other work, assisted on city and county examinations, but most of the work has been in connection with the railroad examinations.

Q. When you say railroad examinations you mean examinations of the books and records of the railway companies with a view to auditing reports made by them of their gross earnings for taxation?

A. Yes.

Q. Have those examinations, as made by you, covered all of the railway companies of Minnesota?

A. All companies report; they are taxed on a gross earnings basis; that, of course, includes railway companies.

Q. Now, can you state from the examination of the accounts of the railway companies of Minnesota what has been the practice and usage of those railway companies in respect to collecting charges for freight moved to the Head of the Lakes in Minnesota, particularly in reference to [fol. 198] whether or not any charge has been made by

them prior to December 31, 1912, other than their tariff charge for hauling the freight, for unloading freight on to the boats at the Head of the Lakes?

A. I don't recall any such outside of this particular case here.

Q. Now, there are and there were prior to December 31, 1912, other railway companies in the state of Minnesota moving iron ore to docks and unloading them on to vessels at the Head of the Lakes, were there not?

A. Yes, there were.

Q. Can you state what the custom and usage and practice of those other railway companies was prior to December 31, 1912, in respect to exacting charges other than the tariff charge for hauling ore for unloading ore on to the boats?

Mr. Lindley: Objected to on the ground that what other companies may have done or may not have done is not material in this case.

Objection sustained.

Mr. Ryan: May it please the Court, I think if we come to discuss the law in this case that it may develop that whether or not the railway company under its tariff is required to unload ore as a part of its main line transportation charge may be a matter of custom or usage.

The Court: Either they owe the tax or they don't owe the tax; it doesn't depend upon what other companies have done.

Mr. Ryan: Well, I will say that that point may arise and [fol. 199] I think it ought to go in, and if the Court doesn't consider it material it can strike it out at that time.

Mr. Lindley: If we got into that we would have to go into the whole question of their ownership of the docks and corporate existence.

The Court: Sustained.

Mr. Ryan: We offer to show at this time that prior to December 31, 1912, there were in the state of Minnesota two railway companies other than the Great Northern Railway Company hauling ore to docks within the state of Minnesota, and that it was their custom and usage and practice for a long period of time prior to December 31, 1912, to unload and deliver iron ore on the boats for the price speci-

fied in the tariff, as being the charge for carrying the ore to the Head of the Lakes.

Mr. Lindley: Same objection as to the previous question.

The Court: Same ruling.

Q. Do you know whether or not it was the custom and practice or usage of any railway company in this state having lines to the Head of the Lakes to deduct from the transportation rate when reporting their earnings for taxation any sum whatever on account of dock charges or any other charge in connection with the delivery of the freight from the car to the vessel?

Same objection and ruling.

Q. Prior to December 31, 1912.

The Court: Same ruling.

Mr. Ryan: Plaintiff offers to show that for a long time [fol. 200] prior to December 31, 1912, it was the custom and practice and usage of the various railway companies of the state to report for taxation all earnings received by them on shipments to the Head of the Lakes without deducting from those earnings any charge or any sum whatever on account of the delivery—on account of the unloading of such freight or the delivery of such freight into the vessels at the Head of the Lakes.

Mr. Lindley: Just as an observation on your offer, that is contrary to what was decided in the Northern Pacific case where they did deduct for their longshoremen.

The Court: Objection sustained.

Mr. Ryan: Then there was an entirely different proposition involved.

Q. What other ore lines in Minnesota deliver ore at the Head of the Lakes? What ore lines did deliver ore to the Head of the Lakes prior to December 31, 1912?

Mr. Countryman: I take it this question is simply to bolster that previous offer?

Mr. Ryan: Yes.

A. The Duluth, Missabe & Northern and the Duluth & Iron Range, and I am not sure the Northern Pacific and the Soo Line commenced to haul from the Cayuna Range

somewhere along about that time, but I wouldn't be sure as to whether it was just before or a little bit later.

Q. And what railway companies have carried freight to docks other than the ore docks at the Head of the Lakes? [fol. 201] A. Well, the Northern Pacific held commercial docks, I think, the Soo Line and the Great Northern, and of the other two I wouldn't be sure whether the Missabe had a commercial dock or not.

Q. The Omaha?

A. And the Omaha, yes; I should have mentioned that.

Plaintiff and defendant here rested and this closed the testimony.

Case to be submitted on briefs.

PLAINTIFF'S EXHIBIT "A"

Great Northern Railway Company, St. Paul, Minn.

Statement of Errors and Omission

Office of Minnesota Tax Commission, State Capitol, St. Paul

To the Auditor of the State of Minnesota:

The Minnesota Tax Commission does hereby certify that the within statement of errors and omission of gross earnings was filed in this office on August 29th, 1913, that the amount of said gross earnings is the sum of $13,448,703.62, that the tax thereon is $510,859.22. That the penalty thereon is $25,542.96 and that the total amount of tax, penalty and interest due from the said above named company is the sum of $536,402.18 and interest thereon at the rate of one per cent per month from April 23rd, 1913, [fol. 202] until paid.

Dated this 2nd day of September, 1913.

Minnesota Tax Commission, by J. G. Armson, Chairman.

Attest: Rukard Hurd, Secretary.

Public Examiner's Certificate of Back Taxes Due on Omitted Gross Earnings

St. Paul, Minn., August 30, 1913.

To Minnesota Tax Commission:

Gentlemen: Pursuant to Chapter 487, General Laws of 1913, and as a result of the examination of the books and records of the Great Northern Railway Company, we report that the said company has omitted gross earnings from their tax returns to the State for taxation as follows:

Amount of Gross Earnings	Tax	Statutory Penalty 5%
$13,448,703.62	$510,859.22	25,542.96

Interest from April 23, 1913 @ 1% a mo. until paid.

Detailed statement showing the item and amounts by years comprising above figures is attached hereto.

Andrew E. Fritz, Public Examiner.

[fol. 203]

Schedule No. 13

Great Northern Ry. Co.

Amounts deducted from Minnesota Revenue before reporting for taxation purposes account payments to the Allouez Bay Dock Company and its predecessors, for handling ore shipments at Superior, Wis.

Year	Total Payments to Dock Company	Deducted from Minnesota Revenue (81.55%)	Rate.	Taxes Due Amount
1901	$232,088.58	$189,268.24	3%	$5,678.05
1902	1,046,417.02	853,353.08	"	25,600.59
1903	999,928.89	815,442.01	"	24,463.26
1904	1,043,321.17	850,828.41	"	25,524.85
1905	1,280,321.84	1,044,102.46	4%	41,764.10
1906	1,522,272.93	1,241,413.57	"	49,656.54
1907	1,857,318.26	1,514,643.04	"	60,585.72
1908	890,888.96	726,519.95	"	29,060.80
1909	1,521,079.51	1,240,440.34	"	49,617.61
1910	1,856,005.28	1,513,572.31	"	60,542.89
1911	2,154,196.53	1,756,747.27	"	70,269.89
1912	2,087,520.46	1,702,372.94	"	68,094.92
	$16,491,359.43	$13,448,703.62		$510,859.22

[fol. 204] PLAINTIFF'S EXHIBIT "B"

Articles of Association of the Lake Superior Company, Limited

Know All Men By These Presents, That we, the undersigned, desiring and intending to form a partnership association, limited, under Chapter 79 of the General Statutes of the State of Michigan (Howell's Annotated Statutes) and all acts amendatory thereof and supplementary thereto, do hereby, for the purpose of forming such partnership association, limited, in compliance with said laws make, subscribe and adopt the following statement in writing:

I

The full names of the persons forming this association, their respective residences, and the amount of capital stock of such association subscribed for by each, are as follows:

James J. Hill, St. Paul, Minnesota,
seventy-five thousand dollars ..... ($75,000)
James N. Hill, St. Paul, Minnesota,
fifteen thousand dollars ..... ($15,000)
Robert I. Farrington, St. Paul, Minnesota,
ten thousand dollars ..... ($10,000)

[fol. 205] II

The total amount of capital of this association shall be and is one hundred thousand dollars ($100,000), which shall be divided into one hundred (100) shares of one thousand dollars ($1,000) each, and for which certificates may be issued in such form as is fixed by the rules which shall be adopted for the management of this association. Such capital shall all be paid in upon the completion of the formation of this association, and is contributed in cash.

The parties so contributing and the proportion so contributed by each, are as follows:

James J. Hill, seventy-five thousand dollars ($75,000).
James N. Hill, Fifteen thousand dollars ($15,000).
Robert I. Farrington, ten thousand dollars ($10,000).

III

The character of the business to be conducted shall be buying, selling, working and dealing in mineral and other lands in the states of Minnesota, Wisconsin and Michigan; the mining of iron ore and other minerals, and marketing the same; the leasing of lands and mines, to be operated upon royalties, upon such terms as may be agreed upon; also the taking and acquiring, by purchase, gift grant, devise, or otherwise, of bonds, stock, certificates of capital [fol. 206] stock, and other securities, or personal property of any state, county or city, or of any railroad corporation, or of any other corporation, public or private, or of any partnership association, limited, and the holding of the same in trust, or the holding of the legal or equitable title thereto; also for the carrying out of such other lawful business as may be incidental, convenient, or profitable in connection with the business which this association is authorized to transact.

The business of this association shall be carried on in the state of Minnesota and Michigan, and in such other states and territories as may hereafter be agreed upon by the members of this association.

There shall be maintained at Marquette, in the county of Marquette, and state of Michigan, the principal office of this association.

IV

The name of this association shall be the Lake Superior Company, Limited.

V

The contemplated duration of this association is twenty (20) years.

[fol. 207]

VI

The affairs of this association shall be managed by a board of managers, three in number, to be chosen according to the rules of management. The first board of managers, who shall hold their offices until the annual meeting of the association in the year 1900, and until their successors are chosen and installed, shall be as follows: James J. Hill,

James N. Hill and Robert I. Farrington, all of whom ar residents of St. Paul, Ramsey County, State of Minnesota and they shall elect from their own number a chairman, a secretary and treasurer.

In Witness Whereof, the parties hereby associating fo the purpose of giving legal effect to this statement here unto sign our names and set our seals at the respective time and places upon which we hereafter acknowledge the same.

Robert I. Farrington. (Seal.) James J. Hill. (Seal.) Jas. N. Hill. (Seal.)

Signed, sealed and executed in presence of F. D. Ponsonby, Macy Nicholson.

U. S. 10¢ Documentary Int. Rev. Stamp. Cancelled.

[fol. 208] PLAINTIFF'S EXHIBIT "C"

Agreement of October 20th, 1899, Between Great Northern Railway Company and Lake Superior Company, Limited

This Contract entered into this 20th day of October, 1899, between the Great Northern Railway Company, hereinafter called the Great Northern Company, and the Lake Superior Company, Limited, hereinafter called the Superior Company, an association organized under the laws of the state of Michigan, Witnesseth:

I

That stocks, bonds and property have been transferred to the Superior Company as follows:

Shares		Par value
9,970	Stock of Great Northern Express Co.	$997,000.00
2,480	Stock of Duluth, Superior & Western Terminal Co.	248,000.00
9,906	Preferred stock of Duluth, Superior & Western Railway Co.	.....
8,923	Common Stock of Duluth, Superior & Western Railway Co.	892,300.00
48	Stock of Duluth, Mississippi River & Northern Railroad Co.	4,800.00
[fol. 209] 745	Stock of West Missabe Land Co., Ltd.	745,000.00
3,910	Stock of North Star Iron Co.	391,000.00
6,461	Stock of North Star Construction Co.	646,100.00
95	Stock of Northern Land Co.	9,500.00
145	Stock of Kalispell Townsite Co.	14,500.00
1,494	Stock of the St. Paul Foundry Co.	149,400.00
14,975	Stock of the Great Northern Elevator Co.	1,497,500.00
495	Stock of the Wenatchee Development Co.	49,500.00
4,975	Stock of the Washington Development & Improvement Co.	497,500.00
294	Stock of Swan River Logging Co., Ltd.	294,000.00
250	Preferred Stock of the Great Lakes Towing Company	25,000.00
200	Common Stock of the Great Lakes Towing Company	20,000.00
100	Stock of the Wenatchee Water Power Co.	10,000.00
2,495	Stock of the Sand Coulee Coal Co.	249,500.00

[fol. 210]

Bonds

$150,000	Northern Land Co.	$150,000.00
15,000	Wenatchee Water Power Co.	15,000.00
1,500,000	Notes of the Pacific Short Line Bridge Co., on which $1,000,000 is paid by sale of collateral securities	1,500,000.00

II

It is agreed by and between the Great Northern Company and the Superior Company in consideration of the transfer of said stock, bonds and property, and as a condition thereof,

1. That the Superior Company shall not sell, transfer or assign any of such stocks, bonds or properties, nor any part thereof, without the consent of the Great Northern Company, and there shall be printed or stamped upon each certificate of said stocks a notice that the same is not assignable or transferable, except with the approval of the Great Northern Railway Company endorsed thereon, signed by its president or other fully authorized officer.

2. The Superior Company shall out of the income derived from the stocks, bonds and properties so transferred, pay all taxes accruing upon the same, all necessary expenses of administration, operation, maintenance and repair, and also the costs of acquiring any additional equipment, property or improvements.

[fol. 211] 3. After paying out of the said income, taxes, expenses of administration, operation, maintenance and repair, and the cost of acquiring additional property, equipment, and improvements, the Superior Company will when requested by the Great Northern Company pay the balance of the total income received by it on account of such stocks, bonds and properties, to the stockholders of the Great Northern Company as they may appear of record at the date of closing the stock transfer books of that company for some regular dividend ratably in proportion to their respective holdings of the Great Northern Company's stock. But such request for payment shall not be made until the amount of such total net profits, income or receipts shall equal at least one-half of one per cent of the amount of the stock of the Great Northern Company outstanding at the time.

The Board of Directors of the Great Northern Company may by resolution approved by its stockholders direct that such profits, income or dividends received by the Superior Company instead of being paid out in the form of dividends

to the stockholders of the Great Northern Company shall be used for the purpose of acquiring other property, or for such other uses or purposes and upon such demands and conditions as may be set forth in such resolution. The Superior Company agrees that it will comply with the provisions and requirements of such resolution.

4. The Great Northern Company may by resolution adopted by its Board of Directors, approved by the stock- [fol. 212] holders, authorize or direct the Superior Company to lease, sell, transfer or exchange the property and assets of either or all of said companies or associations or any part thereof, and the proceeds or receipts derived from such sale, lease or exchange shall be held by it and accounted for or disposed of as required by such resolution.

5. Upon demand of the Great Northern Company made by resolution of its Board of Directors, approved by its stockholders, the Superior Company agrees to transfer the stock, bonds and property held by it hereunder, in whole or in part, to the Great Northern Company or to such other body or person as may be designated by such resolution, and that it will comply with the provisions and requirements of such resolution in that regard.

6. Action of the stockholders of the Great Northern Company authorized or required under the provisions of this contract, shall be in the form of resolutions to be adopted at the annual meeting or at an adjournment thereof, or at some other regularly called meeting. At such meeting of the stockholders the votes of the majority of the shares of the stock of the Great Northern Company present and voting shall be final and conclusive as respects any matter embraced in this contract, and have the same force and effect as though owners of all the stock had been present and by their action concurred therein.

7. Copies of resolutions relating to the matters covered by this contract, adopted by the Board of Directors of the [fol. 213] Great Northern Company, or by its stockholders, certified by the Secretary or Assistant Secretary of the Great Northern Railway Company to be correct, shall be delivered to the Superior Company, and it shall accept such resolution as its authority to act and shall be governed by

them as respects matters growing out of the provisions of this contract.

In witness whereof the parties hereto have caused this instrument to be executed by their duly authorized officers. Great Northern Railway Company, by W. P. Clough, Its Vice President. Attest: E. Sawyer, Assistant Secretary. (Corporate Seal Great Northern Railway Company.) Lake Superior Company, Limited, by James J. Hill, Chairman Board of Managers. Attest: James N. Hill, Secretary. (Corporate Seal Lake Superior Company, Limited.)

[fol. 214] PLAINTIFF'S EXHIBIT "D"

Articles of Incorporation of the Allouez Bay Dock Company

I

The undersigned do hereby associate themselves into a corporation under the provisions of chapter 86 of the statutes of the state of Wisconsin for 1898, and the amendments to said chapter, for the following purposes:

The constructions, purchase, lease, ownership and management of docks, piers, basins, warehouses and elevators, and for the purpose of acquiring real estate adjacent thereto and useful or necessary in connection with the ownership, operation and management of docks, piers, basins, warehouses and elevators, and to that end do make and adopt the following articles of incorporation:

II

The name of this corporation shall be the Allouez Bay Dock Company and the place where its principal office is to be located is the city of Superior, in the County of Douglas in the state of Wisconsin.

III

The capital stock of this corporation shall be one hundred thousand dollars. The number of shares into which the

said capital stock is divided is ten thousand shares of the par value of one hundred dollars each.

IV

[fol. 215] The general officers of this corporation shall be a president, a secretary and treasurer and a superintendent and such other officers as the stockholders or board of directors may from time to time provide for. The Board of Directors of this corporation shall consist of three directors.

V

The principal duties of the President of this corporation shall be to preside over all meetings of the Board of Directors and stockholders and have general charge of the business and the interests of the corporation.

The principal duties of the Secretary and Treasurer shall shall be to keep minutes and records of proceedings of all meetings of the Board of Directors and the stockholders and to receive and disburse the money of the corporation.

The principal duties of the Superintendent shall be to take general management of the affairs and business of the corporation, subject to the direction of the President and managing officers.

Each of said officers shall perform such other and additional duties as may be prescribed from time to time by rules or by-laws to be adopted by the corporation.

VI

Persons holding stock according to the regulations of the corporation shall become members thereof, and mem-[fol. 216] bers may be discharged or expelled upon proper proof and judgment entered in court having jurisdiction.

Dated this 6th day of April, 1903.

Thomas E. Lyons, Henry S. Butler, Charles N. O'Hare.

In presence of Sarah Katherine Parriott, Joseph Roper.

STATE OF WISCONSIN,
Douglas County, ss:

Personally came before me this 6th day of April, A. D. 1903, the above named Thomas E. Lyons, Henry S. Butler and Charles N. O'Hare, to me known to be the persons who executed the foregoing instrument and acknowledged the same.

Joseph Roper, Notary Public, Douglass County, Wisconsin. My commission expires Aug. 17, 1904. (Seal.)

STATE OF WISCONSIN,
Department of State, ss:

Received and filed this 7th day of April, A. D. 1903.
James A. Stone, Assistant Secretary of State.

[fol. 217] PLAINTIFF'S EXHIBIT "E"

G. N. Ry. G. F. O. No. 17248. G. N. I. C. C. No. A-2063

Great Northern Railway Freight Tariff on Iron Ore, Carloads (Minimum Weight, Visible Capacity of Car)

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Forest Mine Spur, Minn	
Alexandria Mine Spur, Minn	
St. Paul Mine Spur, Minn	
Moore, Minn	
Nashwauk, Minn	
Hawkins Mine Spur, Minn.	
Crosby Mine Spur, Minn	
La Rue Mine Spur, Minn	
Kelly Lake, Minn.	
Stevenson, Minn	
Emmert, Minn	
Flanders, Minn	

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Leetonia Mine Spur, Minn	80 cts.
Agnew Jct., Minn	
Cyprus Mine Spur, Minn	
Utica Mine Spur, Minn	
Mahoning, Minn	
Agnew Mine Spur, Minn	
Penobscot, Minn	
Hibbing, Minn	
Susquehanna Mine Spur, Minn.	
Laura Mine Spur, Minn	
Williams Mine Spur, Minn	
Albany Mine Spur, Minn	
Simpson, Minn	
Munroe Mine Spur, Minn	
Tener Mine Spur, Minn.	
[fol. 218] Leonard Mine Spur, Minn.	
Pierce, Minn.	
Jordan Mine Spur, Minn	
Chisholm, Minn	
Croxton, Mine Spur, Minn	
Interstate Iron Co. Spur, Minn	
Grant Mine Spur, Minn.	
Sharon Mine Spur, Minn	
Buhl, Minn	
Frantz Mine Spur, Minn	
Lucknow, Minn	
Kinney Mine Spur, Minn.	80 cts.
Yates Mine Spur, Minn	
Ellis, Minn	
Kinrose, Minn	
Cardiff, Minn.	
Iroquois Spur, Minn	
Virginia, Minn	
Columbia Mine Spur, Minn	
Sauntry Mine Spur, Minn	
Commodore Mine Spur, Minn.	
Webb Mine Spur, Minn	
Pillsbury Jct., Minn	
Morrow Mine Spur, Minn	

The rate named herein includes delivery to vessel.

Effective August 6, 1906.

This rate must not be exceeded to or from any inter mediate point on direct line in same direction on any lik shipment.

W. W. Broughton, Frt. Traf. Mgr., St. Paul, Minn.
H. A. Kimball, A. G. F. A., St. Paul, Minn.

(200) (Authority 4570)

[fol. 219] PLAINTIFF'S EXHIBIT "F"

G. N. Ry. G. F. O. No. 19340. Cancels G. F. O. 17248

G. N. I. C. C. No. A-2756. Cancels I. C. C. No. A-2063

Great Northern Railway Freight Tariff on Iron Ore, Carloads

(Minimum Weight Visible Capacity of Car)

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Forest Mine Spur, Minn.	.....
Alexandria Mine Spur, Minn.	.....
St. Paul Mine Spur, Minn.	.....
Moore, Minn.	.....
Nashwauk, Minn.	.....
Hawkins Mine Spur, Minn.	.....
Crosby Mine Spur, Minn.	.....
La Rue Mine Spur, Minn.	.....
Kelly Lake, Minn.	.....
Stevenson, Minn.	.....
Emmert, Minn.	.....
Flanders, Minn.	.....
Leetonia Mine Spur, Minn.	.....
Agnew Jct., Minn.	80 cts.
Cyprus Mine Spur, Minn.	.....
Utica Mine Spur, Minn.	.....
Mahoning, Minn.	.....
Agnew Mine Spur, Minn.	.....
Penobscot, Minn.	.....
Hibbing, Minn.	.....
Susquehanna Mine Spur, Minn.	.....

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Laura Mine Spur, Minn.	.....
Williams Mine Spur, Minn.	.....
Albany Mine Spur, Minn.	.....
[fol. 220] Simpson, Minn.	.....
Munroe Mine Spur, Minn.	.....
Tenor Mine Spur, Minn.	.....
Leonard Mine Spur, Minn.	.....
Pierce, Minn.	.....
Jordan Mine Spur, Minn.	.....
Chisholm, Minn.	.....
Croxton Mine Spur, Minn.	.....
Interstate Iron Co. Spur, Minn.	.....
Grant Mine Spur, Minn.	.....
Sharon Mine Spur, Minn.	.....
Buhl, Minn.	.....
Frantz Mine Spur, Minn.	.....
Lucknow, Minn.	.....
Kinney Mine Spur, Minn.	80 cts.
Yates Mine Spur, Minn.	.....
Ellis, Minn.	.....
Kinrose, Minn.	.....
Cardiff, Minn.	.....
Iroquois Spur, Minn.	.....
Virginia, Minn.	.....
Columbia Mine Spur, Minn.	.....
Sauntry Mine Spur, Minn.	.....
Commodore Mine Spur, Minn.	.....
Webb Mine Spur, Minn.	.....
Pillsbury Jct., Minn.	.....
Morrow Mine Spur, Minn.	.....

The rate named herein includes weighing, sorting, docking and delivery to vessel.

Issued March 20, 1908. Effective April 22, 1908.

Directly intermediate stations, sidings or spurs will take rate applying from next more distant station.

Issued by

W. P. Kenney, Asst. Traf. Mgr., St. Paul, Minn.; H. A. Kimball, A. G. F. A., St. Paul, Minn.

(200.) (File 4090.) Authority 12020.

[fol. 221] PLAINTIFF'S EXHIBIT "G"

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff.

G. N. Ry. G. F. O. No. 21590. Cancels G. F. O. No. 19340

G. N. I. C. C. No. A-3174. Cancels I. C. C. No. A-2756

Great Northern Railway Local Tariff on Iron Ore, Carloads

Minimum Weight Visible Capacity of Car

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Agnew Mine Spur, Minn.	.....
Albany Mine Spur, Minn.	.....
Bovey, Minn.	.....
Bray Mine Spur, Minn.	.....
Buhl, Minn.	.....
Cardiff, Minn.	.....
Chisholm, Minn.	.....
Commodore Mine Spur, Minn.	.....
Crosby Mine Spur, Minn.	.....
Croxton Mine Spur, Minn.	.....
Cyprus Mine Spur, Minn.	.....
Dale Mine Spur, Minn.	.....
Ellis, Minn.	.....
Emmert, Minn.	.....
Euclid Mine Spur, Minn.	.....
Flanders, Minn.	.....
Forest Mine Spur, Minn.	80 cts.
Grant Mine Spur, Minn.	.....
Hanna Mine Spur, Minn.	.....
Hawkins Mine Spur, Minn.	.....
[fol. 222] Harold Mine Spur, Minn.	.....
Helmar Mine Spur, Minn.	.....
Hibbing, Minn.	.....
Hill Mine Spur, Minn.	.....
Holman, Minn.	.....
Iroquois Mine Spur, Minn.	.....
Jennings Mine Spur, Minn.	.....
Jordan Mine Spur, Minn.	.....
Keewatin, Minn.	.....

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Kelly Lake, Minn.	.....
Kinney Mine Spur, Minn.	.....
Kinross, Minn.	.....
La Rue Mine Spur, Minn.	.....
Laura Mine Spur, Minn.	.....
Leotonia Mine Spur, Minn.	.....
Leonard Mine Spur, Minn.	.....
Lucknow, Minn.	.....
Mace Mine Spur, Minn.	.....
Mahoning Mine Spur, Minn.	.....
Marble, Minn.	.....
Mississippi Mine Spur, Minn.	.....
Monroe Mine Spur, Minn.	.....
Moore, Minn.	.....
Morrow Mine Spur, Minn.	.....
Morton Mine Spur, Minn.	.....
Nashwauk, Minn.	.....
Nassau Mine Spur, Minn.	.....
North Cyprus Mine Spur, Minn.	.....
North Star Mine Spur, Minn.	.....
North Uno Mine Spur, Minn.	.....
Onandaga Mine Spur, Minn.	80 cts.
Pearce Mine Spur, Minn.	.....
Pearson Mine Spur, Minn.	.....
Pillsbury Junction, Minn.	.....
St. Paul Mine Spur, Minn.	.....
Scranton Mine Spur, Minn.	.....
Seville Mine Spur, Minn.	.....
Simpson, Minn.	.....
South Uno Mine Spur, Minn.	.....
Stevenson Mine Spur, Minn.	.....
Susquehanna Mine Spur, Minn.	.....
Tener Mine Spur, Minn.	.....
Utica Mine Spur, Minn.	.....
[fol. 223] Virginia, Minn.	.....
Walker Mine Spur, Minn.	.....
Webb Mine Spur, Minn.	.....
Williams (Longyear) Mine Spur, Minn.	.....

The rate named herein includes weighing, sorting, docking and delivery to vessel.

Application of Rates

Intermediate Application: Rates from any point not named in this tariff but which is directly intermediate to a point from which rates are named, will be the same as the rate from the first point beyond from which rate is shown in this tariff.

Issued March 2, 1910. Effective April 5, 1910.

Issued by

W. P. Kenney, Asst. Traffic Manager, St. Paul, Minn.

(200.) (File 4090.) (Authority 22132.)

[fol. 224] EXHIBIT "H"

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff.

G. N. Ry. G. F. O. 22252. Cancels G. F. O. No. 21590

G. N. I. C.C. No. A-3303. Cancels I. C. C. No A-3174

Great Northern Railway Local Tariff on Iron Ore, Carloads

Minimum Weight Visible Capacity of Car

Application of Rates

Intermediate Application: Rates from or to any point not named in this tariff but which is directly intermediate to a point from or to which rates are named, will be the same as the rate from or to the first point beyond from or to which rate is shown in this tariff.

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Agnew Mine Spur, Minn.	.....
Albany Mine Spur, Minn.	.....
Bovey, Minn.	.....
Bray Mine Spur, Minn.	.....
Buhl, Minn.	.....
Cardiff, Minn.	.....
Chisholm, Minn.	.....
Coleraine, Minn.	.....
Commodore Mine Spur, Minn.	.....
Crosby Mine Spur, Minn.	.....
Croxton Mine Spur, Minn.	.....
Cyprus Mine Spur, Minn.	.....
Dale Mine Spur, Minn.	.....
Ellis, Minn.	.....
Emmert, Minn.	.....
Euclid Mine Spur, Minn.	.....
Flanders, Minn.	.....
Forest Mine Spur, Minn.	80 cts.
[fol. 225] Grant Mine Spur, Minn	.....
Hanna Mine Spur, Minn	.....
Hawkins Mine Spur, Minn	.....
Harold Mine Spur, Minn	.....
Helmar Mine Spur, Minn	.....
Hibbing, Minn	.....
Hill Mine Spur, Minn	.....
Holman, Minn	.....
Iroquois Mine Spur, Minn	.....
Jennings Mine Spur, Minn	.....
Jordan Mine Spur, Minn	.....
Keewatin, Minn	.....
Kelly Lake, Minn	.....
Kinney Mine Spur, Minn	.....
Kinross, Minn	.....
La Rue Mine Spur, Minn	.....
Laura Mine Spur, Minn	.....
Letonia Mine Spur, Minn	.....
Leonard Mine Spur, Minn	.....
Lucknow, Minn	.....
Mace Mine Spur, Minn	.....
Mahoning Mine Spur, Minn	.....

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs
Marble, Minn	
Mississippi Mine Spur, Minn	
Monroe Mine Spur, Minn	
Moore, Minn.	
Morrow Mine Spur, Minn	
Morton Mine Spur, Minn	
Nashwauk, Minn	
Nassau Mine Spur, Minn	
North Cyprus Mine Spur, Minn	
North Star Mine Spur, Minn	
North Uno Mine Spur, Minn	
Onandaga Mine Spur, Minn	80cts.
Pearce Mine Spur, Minn	
Pearson Mine Spur, Minn	
Pillsbury Junction, Minn	
St. Paul Mine Spur, Minn	
Scranton Mine Spur, Minn	
Seville Mine Spur, Minn	
Simpson, Minn	
South Uno Mine Spur, Minn	
Stevenson Mine Spur, Minn	
Susquehanna Mine Spur, Minn.	
Tener Mine Spur, Minn	
Utica Mine Spur, Minn	
[fol. 226] Utica Mine Spur, Minn.	
Virginia, Minn	
Walker Mine Spur, Minn	
Webb Mine Spur, Minn	
Williams (Longyear) Mine Spur, Minn	

The rate named herein includes weighing, sorting, dock ing and delivery to vessel.

Issued September 9, 1910. Effective October 15, 1910
By W. B. Kenney, Assistant Traffic Manager, St Paul, Minn.

(200.) (File 4090.) (Authority 25157.)

EXHIBIT "I"

No Supplement to this tariff will be issued except for the purpose of cancelling the tariff.

G. N. Ry. G. F. O. No. 23159. Cancels G. F. O. No. 22252

G N. I. C. C. No. A-3472. Cancels I. C. C. No. A-3303

Great Northern Railway Local Tariff on Iron Ore, Carloads

Minimum Weight Visible Capacity of Car

Application of Rates

Intermediate Application: Rates from or to any point not named in this tariff but which is directly intermediate to a point from or to which rates are named, will be the same as the rate from or to the first point beyond from or to which rate is shown in this tariff.

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Agnew Mine Spur, Minn	
Albany Mine Spur, Minn	
[fol. 227] Alexander Mine Spur, Minn	
Bovey Mine, Minn	
Bray Mines, Minn.	
Buffalo & Sus. Mine Spur, Minn	
Buhl, Minn	
Cardiff, Minn	
Cavour Mine Spur, Minn	
Chisholm, Minn	
Coleraine, Minn	
Columbia Mine Spur, Minn	
Commodore Mine Spur, Mnin	
Crosby Mine Spur, Minn	
Croxton Mine Spur, Minn	
Cypress Mine Spur, Minn	
Dale Mine Spur, Minn	
Ellis, Minn	
Emmert, Minn	
Euclid Mine Spur, Minn.	*60 cts.

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Flanders, Minn	
Forest Mine Spur, Minn.	
Frantz Mine Spur, Minn	
Grand Rapids, Minn.	
Grant Mine Spur, Minn	
Hanna Mine Spur, Minn	
Hawkins Mine Spur, Minn	
Harold Mine Spur, Minn.	
Helmar Mine Spur, Minn	
Hibbing, Minn	
Hill Mine Spur, Minn	
Holman, Minn	
Interstate Iron Co. Spur, Minn	
Iroquois Spur, Minn	
Jennings Mine Spur, Minn	
Jordan Mine Spur, Minn	
Keewatin, Minn	
Kelly Lake, Minn	
Kinney Mine Spur, Minn	
Kinross, Minn	
La Rue Mine Spur, Minn	
Laura Mine Spur, Minn	
Leetonia Mine Spur, Minn	
Leonard Mine Spur, Minn	
Lucknow, Minn	
Mace Mine Spur, Minn	
[fol. 228] Madeira Mine Spur, Minn	
Mahoning Mine Spur, Minn	
Marble, Minn	
Mississippi Mine Spur, Minn	
Moore, Minn	
Morrow Mine Spur, Minn	
Morton Mine Spur, Minn	
Munroe Mine Spur, Minn	
Nashwauk, Minn	
Nassau Mine Spur, Minn	
North Cyprus Mine Spur, Minn	
North Star Mine Spur, Minn	
North Uno Mine Spur, Minn	

To Allouez Dock, Wis., from	Rate per gross ton 2,240 lbs.
Onondaga Mine Spur, Minn	
Pearson Mine Spur, Minn	*60 cts.
Pierce, Minn	
Pillsbury Junction, Minn	
Roberts Mine Spur, Minn	
St. Paul Mine Spur, Minn	
Sauntry Mine Spur, Minn	
Scranton Mine Spur, Minn	
Seville Mine Spur, Minn	
Sharon Mine Spur, Minn	
Simpson, Minn	
South Uno Mine Spur, Minn	
Stevenson Mine Spur, Minn	
Susquehana Mine Spur, Minn	
Tener Mine Spur, Minn	
Utica Mine Spur, Minn	
Virginia, Minn	
Wacouta & Brunt Mine Spur, Minn	
Walker Mine Spur, Minn	
Webb Mine Spur, Minn	
Williams Mine Spur, Minn	
Winnifred Mine, Minn	
Yates Mine Spur, Minn	

The rate named herein includes weighing, sorting, docking and delivery to vessel.

Issued November 22, 1911. Effective December 26, 1911.
Issued by
H. A. Jackson, Assistant Traffic Manager, St. Paul, Minn.

(200.) *Reduction. (File 4090.) (Authority 30680.)

[fol. 229] PLAINTIFF'S EXHIBIT "J"

This agreement, made and entered into this 1st day of June, 1903, between the Great Northern Railway Company, hereinafter called the "Railway Company," and the Allouez Bay Dock Company, hereinafter called the "Dock Company," witnesseth:

Whereas, the Dock Company controls and operates certain ore docks situated upon the waters of Allouez Bay, upon Lots seven (7) and eight (8), in Section twenty-nine (29), Township forty-nine (49) North of Range Thirteen (13) West of the Fourth Principal Meridian, in Superior, Douglas County, Wisconsin, together with railway tracks forming a part of said dock, and which connect with the line of railway operated by the Railway Company near the intersection of Hatch Avenue and Sixth Street, in said Superior, Wisconsin, and the Railway Company desires to run its cars loaded with ore upon said dock for the purpose of unloading ore thereon.

Article I. The Dock Company hereby grants to the Railway Company license and permission to run its ore trains and cars, loaded with ore and drawn by its own locomotives and manned by its own crews upon and over said tracks of the Dock Company, to and upon its said dock.

The Railway Company agrees to so place its trains loaded with ore that cars may be unloaded into the pockets in said docks, and that it will remove from the docks all cars after they have been unloaded as hereinafter provided.

[fol. 230] Article II. The Dock Company agrees that it will, during the term of this instrument, unload ore from the cars so delivered upon its docks by the Railway Company, and properly store and handle the same in the pockets in said docks, and deliver the same on board boats as and when required by said Railway Company.

Article III. The Dock Company shall and will during the term of this agreement, keep and maintain its said docks and tracks in connection therewith in such state of repair and efficiency as to make them suitable, safe and proper for the handling of ore thereon, as herein agreed.

In the event that the Dock Company shall fail to make necessary repairs of said tracks and docks, the Railway Company may make such repairs and deduct the cost thereof from any moneys due or to become due to the Dock Company under the terms hereof.

The Dock Company agrees at its own cost and expense, for and during the term of this contract, to keep any and

all ore stored upon said docks insured for the benefit of the owner thereof or of the Railway Company, as the Railway Company may request.

Article IV. The Railway Company shall and will pay to the Dock Company for each and every ton of ore unloaded upon said docks and loaded by the Dock Company on board boats, at the request of the Railway Company, the sum of twenty-five cents (25¢) per ton; payment to be made as follows:

[fol. 231] The Railway Company shall, when requested by the Dock Company, during the term of this contract, pay the employes of the Dock Company employed in or about the operation of said docks, upon pay-rolls duly certified by the superintendent of the Dock Company in charge of said docks, and also all bills for materials and repairs or otherwise incurred in and about the maintenance, repair and operation of said docks and tracks, not exceeding, however, the amount due from the Railway Company to the Dock Company for unloading and storing said ore on said docks and loading same on board boats as herein provided.

The balance due to the Dock Company from the Railway Company, after making such payments, shall be by the Railway Company paid over to the Dock Company from time to time upon demand of its treasurer.

Nothing in this agreement shall be construed as authorizing the Railway Company to control or in any manner interfere with the operation of said docks or with the employes of the Dock Company, but the control of said docks and employes of the Dock Company shall be and remain solely in the Dock Company.

Article V. The employes of the Railway Company, in moving cars of ore over the tracks of the Dock Company shall be deemed to be solely the employes of the Railway Company, and it shall be solely liable for any and all injury or damage to persons or property occasioned by the [fol. 232] negligence of its employes in connection with transporting cars on said tracks and onto and over the tracks and docks of the Dock Company.

The Railway Company also assumes all risk of injury or damage to its cars, locomotives or property, while be-

ing operated upon the tracks and docks of the Dock Company, and will indemnify and save harmless the Dock Company from any and all loss or damage on account of claims for injury or damage to the engines and cars of the Railway Company, or on account of personal injuries to the employes of the Railway Company operating said engines and cars upon the tracks and docks of the Dock Company, whether such injury or damage be occasioned by the defective condition of the docks, tracks or structures of the Dock Company, or otherwise.

The Dock Company shall, except as above provided, be solely liable for any and all injury or damage to persons or property occasioned by the negligence of its employes or agents in unloading or storing ore on said docks, or loading it from said docks on boats, or caused by the construction or defects or want of repair of said docks, and for all injury or damage to any of the ore stored on said docks by fire while on said docks or otherwise. It shall indemnify and save harmless the Railway Company, from any and all claims or liabilities on account of any such injury or damage.

Article VI. This agreement, may at any time, be terminated by mutual consent of the parties hereto or by either [fol. 233] party upon ninety days' notice in writing to the other party, and shall continue in force, unless terminated as provided, for the period of ten (10) years from the date hereof.

In witness Whereof, the parties to this agreement have caused same to be executed the day and year first hereinabove written.

Great Northern Railway Company, by Louis W. Hill, Assistant to the President. Attest: E. Sawyer, Assistant Secretary. (Seal.) Allouez Bay Dock Company, by D. M. Philbin, President. Attest: J. A. Murphy, Secretary. (Seal.)

PLAINTIFF'S EXHIBIT "K"

WRB LCG

Indenture, Made this first day of August, 1909, between the Allouez Bay Dock Company, hereinafter called the

Allouez Company, of the first part, and the Great Northern Railway Company, hereinafter called the Northern Company, of the second part, witnesseth:

[fol. 234] The handling by the Allouez Company of cars of ore from the Northern Company's yard at Allouez, Wisconsin, to and onto the Allouez Company's docks and the return of the empty cars to the Northern Company's yard has been and is unsatisfactory and has resulted and now results in delays and unsatisfactory service generally. It is the desire of both parties to remedy this situation.

Therefore: The Allouez Company does hereby lease and demise to the Northern Company the railway tracks of the Allouez Company at Allouez Bay in the county of Douglas, state of Wisconsin, extending from the intersection of said tracks with the center line of the track of the Chicago, St. Paul, Minneapolis, and Omaha Railway Company to and onto the ore docks of the Allouez Company, including the tracks on said ore docks and the interlocking plant controlling the operation of said tracks; and also two switching locomotives owned by said Allouez Company. Said tracks and property hereby leased are shown in red on the plat hereto attached and hereby made a part hereof. It is expressly understood that the ore docks of the Allouez Company and the approaches thereto are excepted from this lease and reserved to the Allouez Company.

The Northern Company shall, during the continuance of this lease, switch cars loaded with ore to and onto the ore docks of the Allouez Company, and shall spot such cars for unloading as may be directed by the superintendent or other proper officer of the Allouez Company, and shall [fol. 235] switch said cars when made empty, from said docks and return the same to the yards of the Northern Company. The Northern Company shall furnish such switch engines in addition to the two switch engines hereby leased as may be necessary and sufficient to perform the work of switching such cars as herein provided; and shall make no charge for such additional engines. The Northern Company shall switch cars of frozen or frosted ore to and from the ore heating house and between said heating house and the ore docks of the Allouez Company as may be necessary.

The Allouez Company shall furnish a sufficient and proper number of men and employes to promptly unload the ore from the cars switched onto said docks by the Northern Company, and shall unload such ore into such pockets as may be directed by the shippers of the ore or by the Northern Company. The Allouez Company shall also promptly load such ore from the pockets of said dock into vessels as directed by the owners of said ore or their agents, or by the Northern Company. The Allouez Company shall, at its own cost and expense, heat and thaw out any and all ore that may arrive at said dock in a frozen or frosted condition and require heating or thawing before it can be unloaded; the Northern Company to switch such cars to and from such heating house as hereinabove provided.

The Allouez Company shall, at its own expense, keep its said ore docks properly lighted at night so that the engines of the Northern Company may safely be operated thereto [fol. 236] and thereon, and shall keep all necessary and proper accounts of the receipts and shipments of ore at and from said ore docks, and shall make all necessary and proper reports thereof to the owners of said ore severally or to their authorized agents and to the Northern Company. The Allouez Company shall also furnish adequate protection at said docks to prevent damage to or destruction of said docks by fire and consequent interruption of the business of the Northern Company; and shall also protect and save harmless the Northern Company from any and all claims arising from loss of ore while stored in said docks, no matter how such loss may arise or be caused.

The Northern Company shall maintain and keep in repair all the railway tracks hereby leased to it, including the interlocking plant and the rails and fastenings on the ore docks and the approaches thereto, but not including any portion of the ore docks or approaches themselves. The Northern Company shall also maintain and keep in repair the two switching locomotives hereby leased.

If, under the orders or requirements of any Federal or state commission or other body having jurisdiction, the Northern Company shall be required to set up in its accounts or to charge depreciation on said two switching locomotives hereby leased, the amount of the depreciation

so charged or set up shall be paid over by the Northern Company to the Allouez Company at least once in each year and shall be by the Allouez Company held as a fund for [fol. 237] replacing either or both of said switching locomotimes when required by the Northern Company or when such switching locomotives become unfit for the service.

The Allouez Company shall maintain and keep in good repair its said ore docks and the approaches thereto so that the said docks and approaches will at all times be safe for the operation thereon and thereover of the Northern Company's cars and locomotives; and shall also maintain and keep in good repair all of the other structures of the Allouez Company located upon its property and which are excepted from this indenture; all of which structures are shown in yellow on the plat hereto attached, and are as follows:

Brick power and pump house.

Dwelling house occupied by the Allouez Company's superintendent.

One building indicated on attached plat as thawing plant.

Two shelter houses, designated "tool houses" on the plat hereto attached and located adjacent to Docket No. 1 and Dock No. 3, respectively.

One tool house, located adjacent to Dock No. 2.

One office building located between Docks Nos. 2 and 3.

One old office building, designated on said plat "Office," located between Docks No. 1 and 2, and used for a tool room, storehouse, carpenter shop, etc.

[fol. 238] Upon the termination of this indenture the Northern Company shall surrender and deliver up to the Allouez Company all the property hereby leased in as good condition as the same is at the date hereof, reasonable wear and tear and damage by the elements alone excepted.

The Northern Company shall and does hereby assume all risk of and liability for damage to or destruction of property or injuries to persons caused by the operation of its locomotives and cars upon and over the tracks hereby demised, unless such loss or damage to property or injuries to persons shall be caused by the negligence of the Allouez Company or its employes or by the joint or concurring negligence of the employes of the Allouez Company

and of the Northern Company. The Allouez Company shall and does hereby assume all risk of and liability for damage to or destruction of property or injuries to persons caused by its negligence or that of its employes in or about the maintenance and operation of said docks. In case any damage to property or injuries to persons shall be caused by the joint negligence of the employes of the Northern Company and of the Allouez Company then all loss and damage arising out of such damage to property or injuries to persons shall be divided equally between the parties hereto. Persons in and about the said docks or tracks engaged in the operation thereof shall be deemed the exclusive employes of the party employing and paying them. [fol. 239] Upon the request of the Northern Company the Allouez Company shall furnish at its own cost and expense such additional tracks and structures on its own property as may be necessary or desirable for the prompt and efficient handling of ore traffic. In case such additional facilities shall be used by the Northern Company they shall be maintained and kept in repair by said company. In case said facilities shall be required for the performance of services which by this agreement the Allouez Company is to perform the cost of their maintenance and repair shall be assumed by the Allouez Company.

The Allouez Company shall repay to the Northern Company promptly upon its demand, any amount which the Northern Company shall be obliged to pay out as taxes or assessments on the property hereby demised.

In consideration of the services herein stipulated to be performed by the Northern Company it is agreed that the division of the through rate for the transportation of iron ore from mines to said docks, including the storage of ore on said docks and the delivery thereof from docks into vessels shall be as follows: Out of said through rate twenty-two cents (22¢) per gross ton of 2,240 pounds shall be paid to the Allouez Company. Said allowance to the Allouez Company shall be based upon the tonnage of ore actually handled over its said ore docks.

It is further agreed that the Northern Company may [fol. 240] interchange traffic with the Northern Pacific Railway Company over the connecting track now located upon

the Allouez Company's property, and that the Northern Company may interchange with any other railway company with whose tracks the tracks now on the Allouez Company's proprety may hereafter be connected, without the payment of any rental or charge to the Allouez Company, and that should the Northern Company make and collect any charge for such interchange or switching the same may be retained by it.

This indenture shall take effect on the first day of August, 1909, and shall continue in effect during the remainder of the year 1909, and thereafter until cancelled by mutual agreement or by the service of ninety (90) days' notice in writing by either party upon the other, stating its intention to cancel and terminate the same.

In witness whereof: The parties hereto have caused this indenture to be executed by their proper officers and their corporate seals to be hereunto affixed, the day and year first above written.

Allouez Bay Dock Company, by D. M. Philbin, Genl. Mgr. Great Northern Railway Company, by Rob't I. Farrington, 2nd Vice-President.

[fol. 241] PLAINTIFF'S EXHIBIT "L"

Indenture, Made this 1st day of July, 1907, between The Eastern Railway Company of Minnesota, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, party of the first part, and the Great Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the said state, party of the second part, witnesseth:

The party of the first part is the owner, subject to the incumbrances hereinafter named, of those certain lines of railway situated in the states of Minnesota and Wisconsin, as follows, to-wit:

1. A line of railway beginning at Hinckley, in the state of Minnesota, and running thence northeasterly in and through the states of Minnesota and Wisconsin, to Duluth, in the state of Minnesota; said line of railway being com-

monly known as the First Division of the party of the first part's railway.

2. A line of railway beginning at a connection with the line of railway above described at or near Boylston, in the county of Douglas, State of Wisconsin, and extending thence in a northwesterly direction into and through the states of Wisconsin and Minnesota to a connection with the railway heretofore owned by the St. Paul, Minneapolis and Manitoba Railway Company at or near the village of Fosston, in the county of Polk, state of Minnesota.

[fol. 242] 3. A line of railway beginning at a connection with said line of railway first hereinabove described at Hinckley, in the state of Minnesota, and extending thence in a southerly and southwesterly direction to a connection with the railway heretofore owned by said St. Paul, Minneapolis and Manitoba Railway Company at Coon Creek, in the state of Minnesota.

4. A line of railway beginning at a connection with the railway second above described at Swan River, in the county of Itasca and state of Minnesota, and extending thence in a northeasterly direction to Virginia, in the county of St. Louis, in said state.

5. A line of railway beginning at a connection with said line of railway second above described, at Brookston, in the county of St. Louis, state of Minnesota, and extending thence in a northerly direction to a connection with said railway fourth above described, at Ellis, in said county of St. Louis; together with certain branch and spur tracks connected with said railways and operated as part thereof.

The party of the first part also owns, subject to the incumbrances hereinafter named, certain elevators and terminal facilities located at Superior, in the state of Wisconsin, and Duluth, in the state of Minnesota. The party of the first part is also a party to certain contracts relating to telegraph service, express service, use of facilities and running rights, and is the owner of sundry other securities and personal property.

[fol. 243] The party of the first part heretofore executed a mortgage known as its First Division Mortgage, bear-

ing date January 21, 1888, to the Central Trust Company of New York, as trustee, to secure an issue of Five million dollars ($5,000,000) of twenty-year gold bonds, maturing April 1, 1908, with interest at a rate not to exceed five per centum, of which bonds $4,700,000 par value, have been issued and are now outstanding; said mortgage covers the line of railway first hereinabove described, together with said elevators located at Superior, in the state of Wisconsin.

The party of the first part heretofore executed a mortgage known as its Northren Division Mortgage, bearing date the first day of April, 1898, to the Mercantile Trust Company of New York, as trustee, to secure the payment of bonds in an amount not to exceed Fifteen million dollars ($15,000,000.00) have been issued and are now outstanding; which said mortgage covers the lines of railway first and second hereinabove described.

Now therefore, The party of the first part, in consideration of the sum of Sixteen million, seven hundred eighty-three thousand, five hundred forty-five dollars and four cents ($16,783,545.04) to it in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and does hereby grant, bargain, sell and convey, unto the party of the second part all and singular the said railways and property so owned by the party of [fol. 244] the first part and hereinabove described; together with all the rights, privileges, immunities and franchises pertaining thereto; all the right of way, yard grounds and yards, station grounds and stations, ground acquired and held or used in connection with said railways or any part thereof, whether acquired or held in the name of the party of the first part or in the name of some person or corporation for its use; all tracks, spur tracks, machine shops and repair shops, and all machinery, tools and implements used therein or in connection therewith; all roundhouses, turntables, water supply plant, docks, warehouses, depots, buildings grain elevators and all the furniture, fixtures and appurtenances thereof; all fuel sheds, and all tools, implements and tackle designed for use in connection therewith; all passenger cars, freight cars, locomotives and equipment of every name and nature; all snow-plows,

steam shovels, electric plant and apparatus and equipment of every kind and description; all track tools, engineering tools and instruments, and all buildings owned and used for office, storage or other purposes by the party of the first part, with the furniture and fixtures thereof; all contracts with express, telegraph or other companies relating to telegraph and express service, running rights or other matters; all stocks and securities of every name and nature owned by the party of the first part; and all other property, real, personal or mixed, of every name and nature and wheresoever situated, owned by the party of the first [fol. 245] part, including all earnings, revenue and income accruing since July 1, 1907.

To have and to hold the same, and each and every part thereof, from and after the first day of July 1907, unto the party of the second part, its successors and assigns, forever. Subject, nevertheless, as to the said several railways to the said mortgage indentures dated January 21, 1888 and April 1, 1898 above described, covering the said railways, respectively. And subject also to all contracts of every name and nature by which the party of the first part has heretofore granted to any person or corporation the right to use, enjoy or occupy any part of the said railways and properties hereby conveyed.

The party of the second part, in consideration of the conveyance hereby made, hereby assumes and agrees to pay each and all of the bonds heretofore issued by the party of the first part and now outstanding under the said mortgages hereinabove referred to, and keep and perform each and every of the covenants and conditions in said mortgages and each of them stipulated to be by the party of the first part kept and performed; and assumes and agrees to perform all and every of the contracts heretofore executed by the party of the first part with telegraph and express companies or other express service along or upon the lines of railway hereby conveyed, or to running rights or other matters connected therewith; and assumes and agrees to pay any and all indebtedness and liabilities of the party [fol. 246] of the first part existing at the date hereof.

The party of the second part shall indemnify and save harmless the party of the first part from any and all loss, costs or expenses on account of any obligation or liability

of the party of the first part herein assumed and agreed to be performed or discharged by the party of the second part.

The party of the first part shall and will, from time to time and at any and all times hereafter and as often as thereto requested by the party of the second part, execute, acknowledge and deliver all such further deeds, conveyances and assurances for the better assuring and conveying unto the party of the second part of the properties hereby conveyed or agreed or intended or contemplated to be hereby conveyed to the party of the second part, its successors and assigns, as the party of the second part shall deem necessary or required.

In witness whereof, the parties hereto have hereunto each caused this instrument to be executed by its proper officers thereunto duly authorized, and its corporate seal to be hereunto affixed, the day and year first above written.

The Eastern Railway Company of Minnesota, by Rob't I. Farrington, Vice President. Attest: E. Sawyer, Secretary. (Corporate Seal.) Great Northern Railway Company, by L. W. Hill, President. Attest: E. Sawyer, Assistant Secretary.

Executed in presence of E. W. McElroy, H. H. Parkhouse.

[fol. 247] STATE OF MINNESOTA,

County of Ramsey, ss:

On this 11th day of October, 1907, before me, personally appeared Robert I. Farrington and Edward Sawyer, to me known, who being by me first duly sworn, each for himself did depose and say: That they are the Vice President and Secretary, respectively, of the Eastern Railway Company of Minnesota, the corporation described in and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation; and that said instrument was executed by them on behalf of said corporation by authority of its board of directors. And said Robert I. Farrington and Edward Sawyer thereupon acknowledged said instrument to be the free act and deed of said corporation.

Earle W. McElroy, Notary Public, Ramsey County, Minnesota. My commission expires April 14, 1911. (Notarial Seal.)

[fol. 248] STATE OF MINNESOTA,
County of Ramsey, ss:

On this 11th day of October, 1907, before me, personally appeared Louis W. Hill and Edward Sawyer, to me known, who being by me first duly sworn each for himself did depose and say: That they are the President and Assistant Secretary, respectively, of the Great Northern Railway Company, the corporation described in and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation; and that said instrument was executed by them on behalf of said corporation by authority of its board of directors. And said Louis W. Hill and Edward Sawyer thereupon acknowledge said instrument to be the free act and deed of said corporation.

Earle W. McElroy, Notary Public, Ramsey County, Minnesota. My commission expires April 14, 1911. (Notarial Seal.)

PLAINTIFF'S EXHIBIT M

4585

This indenture, made this 1st day of June, A. D. 1903, between the Duluth Superior & Western Terminal Company, a corporation organized under the laws of the State of West Virginia, hereinafter called the 'Terminal Company,' party of the first part, and the Allouez Bay Dock [fol. 249] Company, a corporation organized under the laws of the State of Wisconsin, hereinafter called the 'Dock Company,' party of the second part, Witnesseth:

Whereas, The Terminal Company owns certain ore docks upon the waters of Allouez Bay, known as Docks Nos. 1 and 2, and is now constructing an additional dock on the waters of said Bay to be known as Dock No. 3, all situated upon Government Lots Numbered Seven and Eight in Section 29, Township 49 North of Range 13 West of the Fourth Principal Meridian, at Superior in Douglass County, Wisconsin; and

Whereas, The Terminal Company owns among others certain railway tracks extending from their intersection

with the center line of the track of the Chicago, St. Paul, Minneapolis and Omaha Railway Company near the intersection of Hatch Avenue and Sixth Street in said Superior, to and upon said docks above described, which tracks are a part of the docks and necessary in their use.

Article I

Section I. The Terminal Company hereby leases to the Dock Company all and singular its said docks and railway tracks above described, together with all the rights, privileges, immunities and franchises appertaining thereto, and all rights of way, yards and grounds of every name and nature acquired and held for use in connection with said tracks or with said docks or any part thereof, whether acquired [fol. 250] or held in its name, or in the name of some other person or corporation for its use, and all structures and building machinery, tools, implements and appliances acquired or used in connection with said docks or tracks, and all other property, real or personal, acquired by the Terminal Company and used or held for use in connection with its said docks and tracks, or any of the same, excepting its two certain switch engines known as engines Nos. 1 and 2.

To have and to hold the same unto the Dock Company, its successors and assigns, for and during the term of ninety-nine years from and after twelve o'clock midnight of the 31st day of May, 1903, unless this lease shall be sooner terminated in the manner hereinafter provided; subject to the rentals, terms, conditions and limitations hereinafter stated,

Section II. All machinery, tools, implements and apparatus coming under the operation of this lease, so far as may from time to time be required by the Board of Directors of the Terminal Company shall have placed and maintained thereon by the Dock Company such distinctive marks to indicate the ownership thereof as such Board shall designate; and all machinery, tools, implements or apparatus furnished by the Dock Company for replacing similar articles leased as herein provided shall also be numbered or marked in like manner.

Section III. During the term of this lease the Dock Company shall operate, or cause to be operated, the docks and

[fol. 251] property hereby leased for the purpose of and in such manner as to furnish facilities for the handling and shipment of iron ore, and shall maintain said leased docks, tracks and property so that the same shall be at all times in a state of repair and efficiency at least as high as at the present time, rebuilding, renewing and replacing the several parts thereof whenever and as often as may be necessary.

The title to the property procured or furnished by the Dock Company in renewal or replacement of property hereby leased shall at once and without further act vest in the Terminal Company and become subject to liens to which the replaced article was subject at the time of such replacement, if so provided in the instrument or instruments creating such liens.

Section IV. Should property covered by this lease become unnecessary or undesirable for use in connection with the maintenance or operation of the docks and railway tracks hereby leased, the Dock Company may, with the assent of the Terminal Company, and of the trustee in any mortgage or mortgages of the Terminal Company covering the same, sell such property at a fair and reasonable price; and in the event of such sale the proceeds thereof shall belong to the Company owning the property sold at the time of the sale, and shall, at the request of the Dock Company, if made within ninety days after sale, be invested in other articles of property necessary or desirable for use in con-[fol. 252] nection with the docks and tracks hereby leased, which articles shall, upon acquisition, belong to the Terminal Company free and clear of liens other than such as may have been created by the Terminal Company, and shall become subject to those liens.

If reinvestment of the proceeds of any such sale is not made by the Dock Company, as herein provided, such proceeds shall be faithfully applied by the Terminal Company as follows:

(a) To the retirement for cancellation of outstanding bonds secured by mortgages forming a lien at the time of the sale upon the property sold and upon such proceeds after sale and in order of mortgage priority by disposing of such proceeds in the manner provided by said mortgage,

or, in the absence of such provision, by purchase of such bonds in the open market.

(b) All purchases of bonds or other obligations for retirement or cancellation shall be made under such rules and regulations and in such markets as shall be approved by the Terminal Company, and such as will insure the lowest prices and most favorable terms for the bonds to be purchased.

Section V. The Dock Company may make all betterments of and additions to the docks, tracks, structures and property hereby leased that may lawfully be required by public authority, or that may in its judgment be necessary or desirable for the prompt and efficient operation of said docks and the handling and shipment of iron ore therefrom. [fol. 253] The title to the part of such betterments and additions as shall be located upon the property hereby leased shall vest in the Terminal Company; and the fair value of the same to the Terminal Company, not exceeding the cost thereof, shall be repaid by the Terminal Company to the Dock Company.

Section VI. This instrument is subject to liens existing at the date hereof upon the docks and property herein described.

Article II

Section I. In consideration of this lease and the rights herein conferred upon it by the Terminal Company, the Dock Company agrees from time to time, during the continuance of this lease, well and faithfully to make payments as follows:

(a) To pay all taxes and assessments upon the property hereby leased, assessed or falling due during the continuance of this lease when and as the same shall become due and payable; all such payments to be made directly to the persons or officers lawfully entitled to receive or collect such taxes or assessments.

(b) To pay the Terminal Company the sum of One hundred and forty Thousand ($140,000.00) Dollars per annum, payable in equal installments of Thirty-five Thousand ($35,000.00) Dollars each on the first days of September,

December, March and June in each year, during the continuance of this lease; or the Dock Company, upon request of the Terminal Company, pay said sums directly to the [fol. 254] Stockholders of the Terminal Company of record on said dates, as a dividend on the stock of the Terminal Company.

(c) To pay to the Terminal Company, at the times herein specified, during the continuance of this lease, to be by the Terminal Company credited to sinking funds to provide for the rebuilding of the docks hereby leased the following sums:

1. On account of Dock No. 1 the sum of $1,666.67 in each month until said dock shall be rebuilt or until the payments so made shall aggregate the sum of $151,666.66.

2. On account of Dock No. 2, the sum of $3,622.55 in each month until said dock shall be rebuilt or until the payments so made shall aggregate of the sum of $519,835.63.

3. On account of extension of Dock No. 2, $1,137.67 in each month until said extension shall be rebuilt or until the payments so made shall aggregate the sum of $192,265.38.

4. On account of Dock No. 3 now in course of construction, one hundred and eightieth (1/180) of the actual cost thereof, to be ascertained and agreed upon, in each month after the same shall have been completed and gone into operation, until said dock shall be rebuilt, or until the payments so made aggregate the total cost of said dock.

5. Whenever, and as often as it may be necessary, under the terms of this lease, to enlarge, extend, improve or rebuild said docks or either of them, or any additional docks [fol. 255] that may be built hereunder, one one hundred and eightieth (1/180) of the actual cost of such enlargement, extension, improvement or rebuilding, in each month after the same shall be completed, until the payments so made shall aggregate the total cost thereof.

Article III

Section I. In case it shall become necessary to rebuild or reconstruct said docks or any of them, the Terminal Company shall apply on the cost of such rebuilding or

reconstruction the amounts credited to the sinking fund on account of such dock, as hereinbefore provided, including the amounts that have, prior to the first day of June, 1903, been credited to the sinking fund by the Terminal Company, and which, on June 1st, 1903, amounted to the following:

For Dock No. 1	$ 98,333.34
For Dock No. 2	132,222.95
For Extension Dock No. 2	12,514.26

If said Docks, or either of them shall be rebuilt according to the present plans thereof, the balance of the cost of so rebuilding the same over and above the amounts theretofore credited to the appropriate sinking fund or funds shall be paid by the Dock Company.

In the event of additional docks being built or of any of the existing docks being enlarged or rebuilt on an improved plan, the Terminal Company shall pay the cost of the additional docks, enlargements or improvements, as shall be located upon property hereby leased.

[fol. 256]

Article IV

Section I. The Terminal Company shall not, during the term of this lease without the express consent, in writing, of the Dock Company make or issue any bonds or other obligations for the payment of money in addition to the bonds now lawfully outstanding, except for the purpose of refunding or paying off previously issued bonds to a like or greater amount.

Article V

Section I. The Dock Company shall, at all times during the continuance of this lease, permit the officers of the Terminal Company and its agents duly authorized for that purpose to have free access to all parts of the docks, tracks and property covered by this lease, including all machine shops, buildings and structures wherein are kept any equipment, machinery or tools hereby leased, or any equipment, machinery or tools supplied by the Dock Company for or in replacement of those hereby leased, for the

purpose of examining into and ascertaining the condition of such leased property.

Article VI

Section I. If the Dock Company shall fail to make, in the manner and time as in this instrument provided, any of the payments which by this instrument it has agreed [fol. 257] to make, or shall fail to perform or fulfill, or cause to be performed or fulfilled, any duty or obligation imposed by law upon the Terminal Company, for failure to perform which duty or obligation the Terminal Company's docks, tracks or property covered hereby would or might become liable to seizure or forfeiture and, if such default shall continue for the period of six months, or in event of the Dock Company being or becoming insolvent, if such default shall continue for the period of sixty days, or if at any time during the term of this lease the Dock Company shall fail or refuse to maintain or operate, or cause to be maintained and operated, the docks and tracks hereby leased with the equipment and appurtenances thereof and which it has agreed to maintain and operate as in this instrument provided, and such default shall continue for thirty days after the expiration of the time for compliance with the valid final award of any Board of Arbitrators constituted and acting in pursuance of the provisions of Article VIII hereof, or for compliance with the final order of judgment of any court of competent jurisdiction, requiring the doing by the Dock Company of the act or acts the omission to do which shall have constituted such default; in every case the Terminal Company may at its option waive such default or rescind this instrument and re-enter and resume possession and control of all and singular the docks, tracks and properties hereby leased. The remedies reserved to the Terminal Company of this Article shall be deemed cumulative only, and shall not deprive the Terminal Company of the right to resort [fol. 258] to any other remedy that shall be afforded by the laws, nor of the right to use such other remedies simultaneously and concurrently with the remedies afforded by this Article.

The rescission by the Terminal Company of this instrument shall not excuse the Dock Company from the obligation to pay any sum of money which has become payable by it before the date of such rescission.

Either party to this indenture may at any time terminate the same by giving to the other party ninety days' notice in writing of its intention to terminate the same, and at the expiration of ninety days from the giving of such notice, this indenture shall terminate and be at an end; or this indenture may be terminated at any time by mutual consent.

Section II. If there shall remain on the ground hereby leased, at the expiration of this lease, or at the time of any rescission or termination of it made as provided in the next preceding section hereof, any docks, tracks, structures or other improvements placed there by the Dock Company, and not by way of replacement of the docks, tracks, structures or plants existing thereon at the date hereof, for which the Dock Company shall not previously have been paid, the Terminal Company shall pay the actual and fair value thereof for use in connection with the leased docks, tracks and property not, in any event exceeding the actual cost thereof to the Dock Company.

[fol. 259] Such payment shall be made:

(a) To the holder or holders of any lien or liens upon the property hereby leased, or the interest of the Dock Company therein upon such docks, tracks, structures or improvements, for labor or materials furnished to the Dock Company for constructing and maintaining the same.

(b) To the Dock Company to the extent of any balance remaining after the payment of such liens.

Any dispute arising between the parties hereto respecting the fair value of any such docks, tracks, structures or improvements shall be submitted to and decided by arbitration as provided by Article VIII hereof.

Article VII

The Dock Company shall, at its own cost, keep the docks and other property hereby leased, insured against fire;

and shall, at the expiration or termination of this lease, restore the property covered by this lease to the Terminal Company in as good condition as at present, ordinary wear and tear alone excepted.

Article VIII

Any and all questions that shall or may arise, touching the construction of this instrument, or any part thereof, or the rights of the parties thereunder, or covering the business, or manner or mode of transacting business, to be carried on under the provisions thereof, upon which [fol. 260] the parties cannot agree, shall be submitted to the arbitrament and award of a board of three disinterested persons, one to be selected by the Terminal Company, its successors or assigns, and one by the Dock Company, its successors or assigns. If either party shall refuse or neglect to appoint an arbitrator within twenty days after written notice from the other of its appointment of an arbitrator on its part, the arbitrator so appointed by the party giving such notice, may, and shall, select and appoint a disinterested person to act as arbitrator for, and on behalf of, the party so notified and refusing or neglecting to appoint. The two thus appointed shall select a third, and the board so appointed shall hear and determine the matter in controversy, upon reasonable notice to both parties of the time and place of hearing; and the decision and award of said board, or any two of them, in the premises, shall be binding and conclusive upon said parties, their successors and assigns, with respect to the matter submitted to and decided by them.

Article IX

Any difference or controversy that may in good faith arise between the parties hereto as to the construction or carrying out of this instrument, or the rights of the parties thereunder, or the transaction of business under the provisions thereof, shall not interrupt the performance of the agreements therein contained or the continuance of business thereunder; but such business shall continue to [fol. 261] be transacted and settlements and payments

made thereunder in the same manner in which the same had been transacted and made prior to the arising of such difference or controversy; and thereupon such payments or restitutions shall be made by the respective parties as may be required by the decision of the arbitrators.

Article X

The provisions of this instrument shall be binding upon and shall inure to the benefit of the successors and assigns of the lessor and lessee respectively.

Article XI

The Terminal Company agrees that it will from time to time, upon request of the Dock Company, make and execute any additional assignment, supplemental lease or assurance, and perform any act, that may be required to carry into effect this lease according to its true intent and meaning, and hereby authorizes the Dock Company, in the management and use of the demised property, or for any lawful purposes in connection therewith, to use the corporate name, seal and franchise of the Terminal Company.

In testimony whereof, The parties hereto have caused this instrument to be subscribed by their respective Presidents or Vice Presidents, and to be sealed with their respective corporate seals, attested by the signatures of their respec- [fol. 262] tive Secretaries on the day and year first herein above written.

Duluth, Superior & Western Terminal Company, by D. M. Philbin, President. Attest: J. H. Gruber, Secretary. (Corporate Seal.) Allouez Bay Dock Company, by D. M. Philbin, President. Attest: J. A. Murphy, Secretary. (Corporate Seal.)

Plaintiff's Exhibit "N"

Resolved that the Lake Superior Company, Limited, be and it is hereby required and directed to cause the Duluth, Superior and Western Terminal Company to sell and con-

vey unto the Allouez Bay Dock Company, as of August 1, 1908, for the sum of $2,829,259.82, to be paid as hereinafter stated, those certain docks owned by said Duluth, Superior and Western Terminal Company and leased to the Allouez Bay Dock Company, known as docks, numbered 1, 2 and 3, situate upon government lots numbered 7 and 8 in Section numbered twenty-nine (29), Township forty-nine (49), North, of Range thirteen (13) West of the Fourth Principal [fol. 263] Meridian, in Douglas County, Wisconsin, together with the railway tracks owned by said Duluth, Superior and Western Terminal Company situate upon said docks and extending therefrom to an intersection with the center line of the track of the Chicago, St. Paul, Minneapolis and Omaha Railway Company as now located in the Southeast quarter (S. E. ¼) of Section thirty-two (32) Township forty-nine (49) North, of Range thirteen (13) West of the Fourth Principal Meridian, in said County of Douglas, State of Wisconsin; together with the track connecting said tracks above described with the track of the Northern Pacific Railway Company and all the right of way and grounds upon which said railway and docks are located, and all the machinery, appliances and appurtenances owned and used in connection with the operation of said docks, and two certain switch engines, owned by said Duluth, Superior and Western Terminal Company and used in connection with the operation of said docks.

Resolved further, that the said Lake Superior Company, Limited, cause said Duluth, Superior and Western Terminal Company to accept in payment of said purchase price the promissory note or notes of said Allouez Bay Dock Company, to bear date on the day of the execution and delivery of said conveyance to be payable on or before ten years after said date to bear interest at the rate of five per cent per annum, payable annually and to be secured by a purchase money mortgage covering said docks, railways and properties to be conveyed to said Allouez Bay [fol. 264] Dock Company as herein provided.

Resolved further that said Lake Superior Company, Limited, cause to be voted in favor of such sale and such action by said Duluth, Superior and Western Terminal Company all the capital stock of said company now held by said Lake Superior Company, Limited, under the contract

of October 20, 1899, being the entire capital stock of said Duluth, Superior and Western Terminal Company.

Resolved further, that the proper officers of this company be and they are hereby authorized and directed to do all acts and things necessary to carry into effect the intent of the foregoing resolution.

On motion of Mr. Farrington, it was,

Resolved that the Lake Superior Company, Limited, be and it is hereby required and directed to cause the Duluth, Superior and Western Terminal Company to sell and convey unto the Great Northern Railway Company, as of August 1, 1908, for the sum of $772,161.89, to be paid unto said Duluth, Superior and Western Terminal Company by said Great Northern Railway Company at the time of the execution and delivery of such conveyance, all that part of the railway now owned by said Duluth, Superior and Western Terminal Company's railway extending from a connection with the line of said Great Northern Railway Company in the Southwest quarter (S. W. ¼) of Section fifteen (15), Township forty-eight (48) North, of Range [fol. 265] fourteen (14), West of the Fourth Principal Meridian, at Saunders, in the State of Wisconsin, and extending thence Northeasterly to an intersection with the center line of the track of the Chicago, St. Paul, Minneapolis and Omaha Railway Company as now located in the Southeast quarter (S. E. ¼) of Section thirty-two (32), Township forty-nine (49) North, of Range thirteen (13) West of the Fourth Principal Meridian, in the City of Superior, State of Wisconsin; said railway having a total length of 5.28 miles; together with all the right of way, station grounds, side tracks, yard tracks and yards, wye tracks, engine houses, coal houses, water tanks and other buildings and structures appurtenant to and used in connection with the operation of said railway above described; excepting only the two switch engines owned by said Duluth, Superior and Western Terminal Company.

Resolved, further that the Lake Superior Company, Limited, cause said Duluth, Superior and Western Terminal Company to accept at par and accrued interest, in part payment of such purchase price such outstanding bonds of said Duluth, Superior and Western Terminal Company as

may be tendered to it by said Great Northern Railway Company and to cancel and retire all bonds so tendered and accepted.

Resolved further, that said Lake Superior Company, Limited, cause to be voted in favor of such sale and such action by said Duluth, Superior and Western Terminal [fol. 266] Company all the capital stock of said company now held by Lake Superior Company, Limited, under the contract of October 20, 1899, being the entire outstanding capital stock of said Duluth, Superior and Western Terminal Company.

Resolved further that the proper officers of this company be and they are hereby authorized and directed to do all acts and things necessary to carry into effect the intent of the foregoing resolution.

I, F. L. Paetzold, Secretary of Great Northern Railway Company, hereby certify that the above and foregoing is a full, true and correct copy of resolution lawfully adopted by the Board of Directors of Great Northern Railway Company, at a meeting of such Board duly and regularly held at the office of the Company in Saint Paul, Minnesota, on September 21st, 1908, at which a majority of the Board, constituting a quorum, was present, as the same appears in full in the minutes of the proceedings of such Board on that date.

In witness whereof, I hereunto have subscribed my name as Secretary of Great Northern Railway Company, and have affixed its corporate seal, this 7th day of December, 1921.

—— ——, Secretary Great Northern Railway Company. (Seal.)

[fol. 267] PLAINTIFF'S EXHIBIT "O"

Agreement, Made this seventh day of December, A. D. 1906, by and between the Lake Superior Company, Limited, an association organized under the laws of the State of Michigan, party of the first part, and Louis W. Hill, James N. Hill, Walter J. Hill and Edward T. Nichols, parties of the second part, Witnesseth:

Whereas, The party of the first part has acquired the shares of stock hereinafter described and transferred, and now holds the same for the benefit of the shareholders of The Great Northern Railway Company; and

Whereas, By contract between the party of the first part and said railway company, bearing date the 20th day of October, A. D. 1899, the right is reserved to said railway company to authorize or direct, by resolution of its Board of Directors approved by its stockholders, a transfer of said shares of stock by said party of the first part; and

Whereas, The said Board of Directors, at a meeting duly held on the 14th day of November, A. D. 1906, did, by resolution, authorize and direct the said party of the first part to enter into this agreement and make the transfer herein made, upon the terms and conditions herein set forth, which resolution has been approved by the stockholders of said railway company at an adjourned annual meeting held on the 19th day of November, A. D. 1906.

[fol. 268] Now, therefore, The party of the first part doth hereby assign, transfer and set over unto the parties of the second part, hereinafter called the "trustees," and to the survivors and survivor of them, and to their successors in the trust herein created, and to their assigns, all and singular the following described personal property, to-wit:

Seven hundred and fifty (750) shares of the par value of One thousand dollars ($1,000.00) each of the capital stock of the West Missabe Land Company, Limited; Five thousand eight hundred and seventy-nine (5,879) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the North Star Iron Company; One thousand (1,000) shares of the par value of One hundred dollars ($100.00) each of the capita stock of the Leonard Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Tyler Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Harrison Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital

stock of the Jackson Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Polk Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Fillmore Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) [fol. 269] each of the capital stock of the Arthur Iron Mining Company, and Five (5) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Van Buren Iron Mining Company.

To have and to hold all and singular the said shares of stock, and any and all shares of stock or other property for which said shares or any of them may at any time be exchanged, or which may at any time accrue to the shareholders of said companies or any of them, or of the successors of any of them, whether by reason of the dissolution of any such company or for any other cause, with all and singular the rights and powers of shareholders in respect thereof, and full power of sale or other disposition thereof, as hereinafter provided to said trustees, and the survivors or survivor of them, and their said successors and assigns.

In trust, however, to hold, use and dispose of the said property and all income and proceeds thereof, upon the trust herein expressed, for and during the lives of the following named persons and the life of the last survivor of them, and for and during the twenty (20) years next following the death of such last survivor, unless said trust shall be sooner determined, the names and description of said persons upon whose lives the duration of said trust is limited, being:

Louis Hill, James Jerome Hill and Cortland Hill, sons of Louis W. Hill, of St. Paul, Minnesota; George Norman Slade, son of George T. Slade, of said St. Paul; Francis [fol. 270] John Ward, and Lawrence Ward, sons of Frank N. Ward, of said St. Paul; Walter Jerome Hill, son of James J. Hill of said St. Paul; Thayer B. Farrington and John D. Farrington, sons of Robert I. Farrington, of said St. Paul; Howard Elliott, Jr., son of Howard Elliott, of said St. Paul; Jule N. Hannaford, Jr., and Foster Hanna-

ford, sons of Jule M. Hannaford, of said St. Paul; Payne Whitney, of New York City; George F. Baker, Jr., son of George F. Baker, of New York City; Samuel Thorne, Jr., son of Samuel Thorne, of New York City; Robert L. Bacon, Gaspar C. Bacon and Elliott C. Bacon, sons of Robert Bacon, of Washington, D. C.

1. The trustees hereunder shall, while holding said shares of stock or any of them of any of such corporations, use and exercise their powers as such shareholders to preserve the existence and the organization of such corporation, and to secure at all times proper management of the property and business and affairs of such corporation.

2. Said trustees shall, at all times, while holding said shares or any of them or any property subject to this trust, collect and receive all dividends declared upon such shares, and all other income or profits or other moneys that may accrue to them, or to which they may become entitled as holders of such shares or other property.

3. Said trustees shall, out of the moneys so received by them, or out of the proceeds of any sales made by them of any of said shares, pay all expenses of said trust, including taxes, if any, and the compensation hereinafter provided to [fol. 271] themselves as trustees. And in no event shall they have recourse to the certificate holders mentioned for the payment of any part of such expenses or payments or any liability incurred by said trustees.

4. After payment made of or provision made for the expenses of said trust, the said trustees shall, from time to time, and at least once in every year, distribute and pay such portion of the net income of proceeds of the property held by them as such trustees, as they may deem proper to be so distributed, among and to the persons appearing as shareholders of the Great Northern Railway Company, registered as such upon its books at the close of business on the 6th day of December, A. D. 1906, and to their assigns, under and by virtue of assignment made in accordance with the provisions therefor hereinafter contained.

5. The interest of the persons made beneficiaries under said trust shall consist of one million five hundred thousand

(1,500,000) equal shares, each original beneficiary being entitled to receive the number of shares, and a certificate therefor, as hereinafter provided, in said trust equal to the number of shares of stock of the Great Northern Railway Company registered at the date last aforesaid in his name as the holder thereof on the books of said company.

A list of said original beneficiaries showing their respective names and addresses, and the number of shares to which each is entitled under said trust, signed by the chairman of the party of the first part and by the parties of the second part hereto, is appended to this instrument.

[fol. 272] 6. The interest of each and every beneficiary under said trust is and shall continue to be limited to the right to receive his proportional share or dividend in such distributions as shall, from time to time, have been determined on and declared by said trustees as hereinbefore provided.

7. The trustees shall cause to be prepared certificates of beneficial interest under said trust, which shall be identical in form, but may be of several series, according to the respective denominations thereof. The certificates of each series shall bear their proper serial designation and shall be numbered consecutively from one upward. Each certificate shall state the proportional interest or number of shares to which the person named therein is entitled under said trust, and such interest shall be assignable only by the person named therein and registered as holder thereof on the books of the trustees, by transfer in writing in person or by his duly authorized attorney, and upon surrender of the certificates representing such interest.

Such assignment may be of all, or any number less than all, of the shares represented by such certificate, but not of any fraction of a share. Nor shall any fraction of a share be represented by or included in any of said certificates.

8. Upon the issue of any certificate the trustees shall enter the same in a book or books to be kept by them for that purpose, such entry to show the number and date of such certificate, the number of shares represented thereby, the name of the person entitled to said shares, his residence or address as given to them on the issue of such certificate,

[fol. 273] or from time to time thereafter, and such other matters as the trustees may deem proper.

And no person not so registered shall be deemed a certificate holder or entitled to any beneficial interest under said trust.

And all dividend cheques, reports, notices or other communications sent by mail, postage prepaid, to any registered holder at such registered address, or to an agent or attorney designated for the purpose by such holder at the address given therefor by such holder, shall be equivalent to a personal delivery to such holder of the matter so sent.

The trustees shall, by writing recorded in the record of their proceedings, appoint a corporation Registrar of Transfers who shall countersign and enter in a register to be kept by it for the purpose each and every certificate issued by the trustees. Such registry shall show the number and date of each certificate, the number of shares represented thereby and the name of the owner, as recorded on the face thereof. When any certificate shall be in any manner canceled the Registrar shall make a detailed entry thereof in said register. No certificate shall be valid unless countersigned by the Registrar.

The trustees may, in their discretion, by writing recorded in the record of their proceedings, appoint a transfer agent or agents, who shall make transfers of certificates, and who shall keep a record of all certificates issued or canceled [fol. 274] through their agency, and shall countersign each and every certificate so issued. No certificate so issued shall be valid unless so countersigned.

The trustees or any of them may, by writing recorded in the record of their proceedings, appoint agents or attorneys who shall sign certificates on his or their behalf and in his or their names as such trustees.

The trustees may, at any time, by writing recorded in the record of their proceedings, remove any such registrar of transfers, transfer agent or other agent or attorney and appoint another in his place.

9. The trustees shall have full power, during the continuance of this trust, to sell at public or private sale, or exchange for other property, or otherwise dispose of all or any part of the shares of stock hereby transferred to

them, or any other property that may have become subject to this trust; and to invest the proceeds of any such sale or sales in other property; and in case of such reinvestment the property so acquired, as well as all property acquired by the trustees in exchange, or otherwise, for property held by them under this trust, shall be held by the trustees under the same trust and with the same powers and duties in respect thereto as are hereby provided in respect to the property herein described and conveyed.

10. The trustees are hereby empowered to hire such suitable offices and employ such clerks, attorneys, mining engineers and other agents or other persons as they may deem [fol. 275] requisite for the proper execution of this trust, and all such expenses and all others incurred by them in the execution of the trust shall be a prior charge thereon to be paid or provided for before divisions of income or other moneys among the certificate holders.

11. The trustees shall keep books of account of their receipts and expenses and business transactions in the execution of such trust, and a record of their own proceedings at their meetings.

They shall make an annual report of their receipts and disbursements, and of the condition of the trust, a copy of which report shall be sent to each certificate holder.

12. Any trustee may at any time resign his trust by writing signed by him and delivered to the remaining trustees or trustee, accompanied by a proper transfer and release of his title to and interest in the trust property. In case of the death or resignation of any trustee the vacancy thereby created shall be filled by the remaining trustee or trustees by resolution and appointment in writing, recorded in the book of record of their proceedings. If at any time there should be but a single trustee remaining, he shall first appoint one trustee, and these two shall appoint a third. If at any time there should be no trustee existing or capable of acting, the Board of Directors of the Great Northern Railway Company, or of such corporation, if any, as shall then be the successor of that company, may appoint one or more trustees.

[fol. 276] When any trustee shall become unable to act by reason of illness, absence, or other cause, the other trustees, after first making a record of such fact in the minutes of their proceedings, shall have and may exercise all the powers herein conferred upon all the trustees.

Any trustee may from time to time, by power of attorney, duly executed, delegate his powers for a period not exceeding twelve (12) months at any one time to the other trustee or to either of them, and every such power of attorney shall be recorded in the record of the proceedings of the trustees.

13. The trustees shall organize and choose one of their number president, and in case of vacancy in that office shall elect one of their number to fill such vacancy. The President shall be the active manager and executive officer in carrying on the business devolving on the trustees. Until the gross income of the trust shall equal five million dollars ($5,000,000.00) in any one year, he shall receive a compensation of Twenty-five thousand dollars ($25,000.00) per annum. And in each year thereafter he shall receive, in addition to the said sum of Twenty-five thousand dollars ($25,000.00) a sum equal to one per cent of the excess of the gross income of the trust for that year over Five million dollars ($5,000,000.00) until his annual compensation shall reach the sum of Fifty thousand dollars ($50,000.00), at which amount it shall remain without further increase.

The trustees may, from time to time, by writing re- [fol. 277] corded in the record of their proceedings, designate one of their number to sign dividend cheques and other cheques drawn against the trust funds, and all cheques signed by the trustees so designated shall be of the same validity and effect as if signed by all the trustees.

The compensation of each of the trustees other than the president shall be Ten thousand dollars ($10,000.00) per year.

14. The trustees, for the better accomplishment of the purposes hereof, may, from time to time, adopt rules not inconsistent with the provisions hereof for the management of said trust and the government of their proceedings, and may from time to time modify, amend or abrogate any rule so adopted.

15. The trustees shall be responsible only for wilful breach of trust, and each shall be responsible only for his own acts and defaults, and not for those of any other trustee.

16. The word "trustees," where used in this instrument, shall be deemed to mean those who may at any time be trustees hereunder.

17. Upon the expiration of the twenty (20) years next following the death of the last survivor of the before mentioned persons upon whose lives the said trust is limited, the trustees shall at once proceed to wind up the affairs of said trust. After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their [fol. 278] hands as such trustees, and shall convey and transfer unto the party of the first part, or its successors or assigns, all property, save said moneys, held by them under said trust.

And thereupon said trust shall cease.

18. The said parties of the second part hereby accept the transfer made and the trust herein expressed.

In witness whereof, the party of the first part hath caused these presents to be executed, in duplicate, by its proper officers, in that behalf duly authorized, and the second parties have to each duplicate set their hands and seals the day and year first above written.

Lake Superior Company, Limited, by Jas. J. Hill, Chairman. Attest: Louis W. Hill, Secretary. Executed in Presence of M. R. Brown, F. S. Dalrymple. Louis W. Hill, Jas. N. Hill, Walter J. Hill, Edward T. Nichols. Executed in presence of M. R. Brown, F. S. Dalrymple.

[fol. 279] DEFENDANT'S EXHIBIT "1"

No supplement to this tariff will be issued except for the purpose of cancelling the tariff.

G. F. D. No. 1447. I. C. C. No. 358

United States Railroad Administration, Director General of Railroads

Duluth, Missabe & Northern Railroad, in Connection with Great Northern Railroad

(Appointment Notice No. 3)

G. N. G. F. O. 1467-a

Stamp here date received: ——.

Joint Freight Tariff of Proportional Rates Applying on Iron Ore, Carloads

Minimum Weight: In wood cars 17 gross tons; in steel cars 31 gross tons

From Pettit, Minn., to Allouez, Wis.

(When for points beyond via Lake Route via Saunders, Wis.)

The rate named herein includes assembling at originating points, weighing and sorting.

[fol. 280] *Rate—95 Cents Per Gross Ton of 2,240 Pounds Plus storage, dockage and handling charges as follows:

For

Storage in cars at dock yards, unloading from cars to docks, storage in docks and loading from docks to vessels: If loaded into vessel within ten days from arrival of cars at dock yards—5¢ per gross ton of 2,240 lbs.

When not loaded into vessel within ten (10) days, a storage charge (same will not be made during the closed season of lake navigation, i. e. the interval between departure of the last vessel and arrival of the first vessel): For each day or fraction thereof after the first ten days—¼¢ per ton 2,240 lbs. per day or fraction thereof.

By authority of Rule 77, Interstate Commerce Commission Tariff Circular No. 18-A, this tariff is not made ap-

plicable from all intermediate points. Upon reasonable request therefor, rates which will not exceed those in effect from more distant points will, under authority granted by the Interstate Commerce Commission, be established from any intermediate point hereunder upon one day's notice to the Commission and to the public.

Issued June 3, 1919. Effective July 7, 1919.

Published for the Director General of Railroads and filed on 30 days' notice with the Interstate Commerce Commission, under Freight Rate Authority No. 3733, of the Direc-
[fol. 281] tor, Division of Traffic, United States Railroad Administration, dated January 8, 1919.

C. W. Kieswetter, General Freight Agent, Duluth, Minn.

* Indicates a reduction.

Athy. No. 70. Sta File A-4. 300.
Iron Ore, Pettit, Minn. Allouez Dock (GFD 1447).

DEFENDANT'S EXHIBIT "2"

Division Sheet No. 2 to G. N. G. F. O. 1467-A Cancels Division Sheet No. 1, Division Sheet No. 478-A Cancels Div. Sheet No. 478 to G. F. O. No. 1447 or Reissues

United States Railroad Administration, Director General of Railroads

Duluth, Missabe & Northern Railroad in Connection with Great Northern Railroad Division of Rate on Iron Ore, Carloads, from Pettit, Minn., to Allouez Dock, Wis., via Saunders, Wis.

Divisions

[fol. 282] The line haul rate will be divided as follows:

D. M. & N. R. R. to Saunders	75%
G. N. R. R. beyond	25%

Effective December 1st, 1919.

C. W. Kieswetter, General Freight Agent, Duluth, Minn.

Authority No. 70 and 78.

STIPULATION SETTLING CASE

It is hereby stipulated that the foregoing official transcript of proceedings had upon the trial of the above entitled action, consisting of 132 pages of typewritten matter, plaintiff's exhibits marked "A" to "O," inclusive, and defendant's exhibit numbered "1," contains all the evidence, proceedings and rulings of the court upon the trial of said action, and the same may, without notice to either party or its attorney, be signed and allowed by the Judge who tried said case as and for a settled case herein.

Clifford L. Hilton, Egbert S. Oakley, Patrick J. Ryan, Attorneys for Plaintiff. M. L. Countryman and F. G. Dorety, Attorneys for Defendant.

Dated October 11th, 1922.

[fol. 283] IN DISTRICT COURT OF RAMSEY COUNTY

ORDER SETTLING CASE

Upon attached stipulation the foregoing official transcript is found conformable to the truth and containing all the evidence, exhibits, rulings and proceedings had upon the trial of the above entitled action, and pursuant to the foregoing stipulation of counsel, the same is hereby signed and allowed as and for a settled case herein.

Dated October 11th, 1922.

Hugo O. Hanft, District Judge.

IN DISTRICT COURT OF RAMSEY COUNTY

STIPULATION AND ADDITION TO SETTLED CASE

116194

It is hereby agreed and stipulated, by and between the parties herein and their respective attorneys, that defendant's Exhibit 2, designated as "Division Sheet No. 2 to G.

N. G. F. O. 1467-A'' and hereto attached, was in error omitted from the settled case herein and said Exhibit 2 may now be added to said settled case and said settled case amended by the addition thereof and the Court may make [fol. 284] its order so amending said settled case.

Dated April 3, 1923.

Clifford L. Hilton, Egbert S. Oakley, Patrick J. Ryan, Attorneys for Plaintiff. M. L. Countryman and F. G. Dorety, Attorneys for Defendant.

Order

Upon the foregoing stipulation, it is ordered that the settled case herein may be amended by adding thereto as one of the exhibits Defendant's Exhibit 2, designated at ''Division Sheet No. 2 to G. N. G. F. O. 1467-A,'' said Exhibit 2 being hereto attached.

Dated April 3, 1923.

Hugo O. Hanft, District Judge.

[fol. 285] Division Sheet No. 2 to G. N. G. F. O. 1467-A
Cancels Division Sheet No. 1, Division Sheet No. 478-A
Cancels Div. Sheet No. 478 to G. F. O. No. 1447 or
Reissues

United States Railroad Administration, Director General of Railroads

Duluth, Missabe & Northern Railroad, in Connection with Great Northern Rairoad, Division of Rate on Iron Ore, Carloads, from Pettit, Minn., to Allouez Dock, Wis., Via Saunders, Wis.

Divisions

The line haul rate will be divided as follows:

D. M. & N. R. R. to Saunders	75%
G. N. R. R. beyond	25%

Effective December 1st, 1919. C. W. Kieswetter, General Freight Agent, Duluth, Minn.

Authority No. 70 and 78.

[fol. 286] IN DISTRICT COURT OF RAMSEY COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter came duly on to be heard by the Court, without a jury, December 6, 1921, Messrs. Clifford L. Hilton, Egbert S. Oakley and Patrick J. Ryan appearing as counsel for plaintiff, and Messrs. M. L. Countryman and E. C. Lindley appearing as counsel for defendant. The complaint was filed September 1, 1914, an answer interposed and filed November 6, 1914, amended answer November 15, 1921, and amended reply 1921. Briefs were furnished by March 8, 1922, and owing to the importance of the question involved, the matter was passed for oral argument, which was had at a much later period, due to illness of counsel.

Upon the files and record, the evidence introduced and the briefs and arguments of counsel the Court finds as Facts:

1

Defendant, Great Northern Railway Company, is and was, between January 1, 1901, and December 31, 1912, a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota, and is and was, during all said period, engaged in operating in Minnesota, and elsewhere, including Wisconsin, certain railway lines, and is and was, during all said period, subject to taxation upon its gross earnings in lieu of all other taxes [fol. 287] upon its property within the state, pursuant to the provisions of the various statutes in force throughout said period. Between 1901 and 1904, both inclusive, railway companies, operating lines within the state, were taxable at the rate of 3% of their gross earnings. Between 1905 and 1912, both inclusive, such railway companies were taxable at the rate of 4% of their gross earnings. Such earnings included all earnings on business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage, over which such business might be done, of earnings on all interstate business passing through, into or out of the state.

2

During said period, beginning with January 1, 1901, and ending with December 31, 1912, there was in operation a certain ore carrying railway line, more particularly described in the pleadings and testimony, extending from the mining regions in St. Louis and Itasca counties in Minnesota, to and including certain ore docks in Allouez Bay at or near the City of Superior, Wisconsin. This line was used exclusively for hauling iron ore from those mines to said docks. All of said ore, so brought to said Allouez Bay Docks, was there unloaded into boats to be carried to the destination of all said ore, the Lower Lake Ports, so-called. The average distance, in main line mileage, over said rail-[fol. 288] way line, from said mines to said docks, was approximately 107 miles, and the mileage proportion of the railway business done over said line, in the State of Minnesota, was 81.55 per cent.

3

From January 1, 1901, to May 1, 1902, all of the ore moved over said line was so moved in the name of the Eastern Railway Company, of Minnesota.

And this company held title to said line from said mines in Minnesota to Saunders, Wisconsin.

4

From May 1, 1902, to December 31, 1912, all of the ore so moved was moved in the name of the defendant, Great Northern Railway Company.

5

In 1906 the Great Northern Railway Company published its tariff setting forth its charges for hauling ore over said line from said mines, each of which were named therein, to said Allouez Bay, including delivery of said ore, and all intermediate services, aboard vessels at said docks, a single charge was made for such whole service. Additional tariffs were from time to time thereafter published of similar nature. Each and all of these tariffs were issued solely by the Great Northern Railway Company and not by the Great

Northern Railway Company jointly with any other railway line, person, firm or corporation. From 1901 to 1906, al- [fol. 289] though such service was not described, or the rates fixed, in printed tariffs, such service and rates were the same as those subsequently specified.

6

From January 1, 1901, until August 1, 1908, that part of said ore carrying line which extended from Saunders, Wisconsin, to, but not including, the Allouez Bay Docks, a distance of about six miles, was nominally the property of the Duluth, Superior & Western Terminal Company, a West Virginia corporation, all of the stock of which was owned or controlled by the Great Northern Railway Company, as hereinafter specifically found. From August 1, 1908, until December 31, 1912, it was the property of the Great Northern Railway Company.

7

From January 1, 1901, to August 1, 1908, the nominal title to said docks was in said Duluth, Superior & Western Terminal Company. From August 1, 1908, to December 31, 1912, such nominal title was in the Allouez Bay Dock Company, a Wisconsin corporation, all of the stock of which was owned or controlled by the Great Northern Railway Company of Minnesota, in form, was operated as a December 31, 1912, the legal title to said docks was in the Great Northern Railway Company.

[fol. 290] 8

From January 1, 1901, to July 1, 1907, at least, the Great Northern Railway Company owned all of the stock of the Eastern Railway Company of Minnesota.

9

From January 1, 1901, to May 1, 1902, said Eastern Railway Company, as hereinafter specifically found. After separate railway company and not as a part of the Great Northern Railway Company. After May 1, 1902, said Eastern Railway Company of Minnesota ceased to operate, in form, as an independent railway company, and the ore line, hereinbefore described, was thereafter operated by the

Great Northern Railway Company as one of its leased lines. On July 1, 1907, there was a conveyance of said ore line (to Saunders, Wis.) from the Eastern Railway Company of Minnesota to the Great Northern Railway Company. On this date, and as a part of the transfer of this ore line, the Great Northern Railway Company assumed all of the existing liabilities of the Eastern Railway Company of Minnesota.

10

Until 1899 the Great Northern Railway Company, held in its own name, all of the stock of the Duluth, Superior & Western Terminal Company.

[fol. 291] 11

In 1899 James J. Hill, James N. Hill and Robert I. Farrington, officers of the Great Northern Railway Company, formed a partnership, under the laws of Michigan, under the name of Lake Superior Company, Limited. All of the stock of the Duluth, Superior & Western Terminal Company was forthwith transferred to this partnership, without consideration, to be held by it in trust for the Great Northern Railway Company, to be held, disposed of, and dealt with in accordance with the instructions of the Board of Directors and stockholders of the Great Northern Railway Company.

12

The Duluth, Superior & Western Terminal Company pretended, prior to January 1, 1901, to form an agreement, orally, with the Eastern Railway Company of Minnesota, by which said Eastern Railway Company of Minnesota undertook to pay said Duluth, Superior & Western Terminal Company, the arbitrary sum of twenty-five cents per ton for each ton of ore hauled by said Eastern Railway Company of Minnesota over that part of this ore line reaching from Saunders to the docks. This pretended agreement was kept in existence until the apparent operation of said ore line by said Eastern Railway Company of Minnesota gave way, on May 1, 1902, to the operation thereof by the Great Northern Railway Company, and said pretended agreement was renewed, orally, between said Duluth, Superior & Western Terminal Company and said Great

[fol. 292] Northern Railway Company to continue in effect until June 1, 1903.

13

The Allouez Bay Dock Company was organized in 1903 at the instance of the Great Northern Railway Company, and all of its stock was taken in the name of the Lake Superior Company, Limited, in trust, to be held, disposed of, and dealt with in accordance with the directions of the Board of Directors and stockholders of the Great Northern Railway Company.

14

The Duluth, Superior & Western Terminal Company, under date of June 1, 1903, entered into a form of agreement giving to the Great Northern Railway Company the use of that part of this ore line which extended from Saunders to the Omaha Crossing, so-called, the Omaha Crossing being in fact the beginning of the approach to the Allouez Bay Docks, and hence to the docks themselves.

15

The Duluth, Superior & Western Terminal Company, under the same date, June 1, 1903, entered into a form of agreement, pretending to lease the docks to the Allouez Bay Dock Company.

16

The Allouez Bay Dock Company, on the same date, June 1, 1903, entered into a form of agreement pretending to put [fol. 293] the Great Northern Railway Company in possession of said docks. The form of this agreement was subsequently changed several times. Under these various forms of agreement the Great Northern Railway Company pretended to pay to the Allouez Bay Dock Company for the use of said docks the arbitrary sum of twenty-five cents for each ton of ore hauled over the ore line until August 1, 1909, and from August 1, 1909, until December 26, 1911, the arbitrary sum of twenty-two cents per ton for each ton so hauled, and after December 26, 1911, the arbitrary sum of fifteen cents per ton for each ton so hauled.

17

In addition to the foregoing, the following pretended transfers of stock, and the following assignments of dividends occurred: In December, 1906, the Great Northern Ore Trust was formed by, or at the instance of, the Great Northern Railway Company and its stockholders. All of the dividends to be earned upon the stocks of the Duluth, Superior & Western Terminal Company, and upon those of the Allouez Bay Dock Company between January 1, 1907, and December 31, 1912, were assigned, without consideration, at the instance of the Great Northern Railway Company, to the Great Northern Ore Trustee. In 1908 the Superior Company, Limited, at the direction of the Great Northern Railway Company, pretended to sell and transfer, for one hundred thousand dollars ($100,000.00), all of the stock of the Allouez Bay Dock Company to the West Mesabi Land Company. The West Mesabi Land Company [fol. 294] was, at the time of said transfer, a corporation, all of whose stock was owned by the Great Northern Ore Trustees. In 1913 the West Mesabi Land Company pretended to transfer and return to the Great Northern Railway Company all of said stock of said Allouez Bay Dock Company for a consideration of six hundred thousand dollars ($600,000.00).

18

The said ore line, from said 1st day of January, 1901, to said 31st day of December, 1912, from the mines in Minnesota to and including the docks at Allouez Bay, was a single, continuous railway line. It was projected, built, and operated as such for the purpose of carrying ore from the mines to be unloaded into vessels beside the docks, and for no other purpose. There was but a single charge, during all of said period, for a continuous, unbroken railway service. There was no separation of said line into separate or connecting parts, yards, or terminals, at Saunders, Wisconsin, at the Omaha Crossing, so-called, or at Allouez Bay Dock. There was no separate or local railway service performed at any of said points. The service at the docks was a necessary and appropriate part of the transportation business of hauling ore over said line.

19

After May 1, 1902, and until December 31, 1912, the Great Northern Railway Company was the real and true owner [fol. 295] of all of said ore line, and during all of said period operated all of said ore line as a part of its railway system. It owned all of the stock of the Duluth, Superior & Western Terminal Company. It owned all of the stock of the Allouez Bay Dock Company. The Lake Superior Company Limited was but its agent. The managing officers of the Great Northern Railway Company were the managing officers of each of said three companies. It did not merely own the stocks of these companies. It had the power to control, and did control, absolutely, during all of said period all of their operations. And each and every organization, hereinbefore referred to in these findings, was created at the instance of the Great Northern Railway Company, and during said period served the purposes of the Great Northern Railway Company. The said ore line, and particularly that part of it extending from Saunders to and including said Allouez Bay Docks, was built, improved and operated with the money of the Great Northern Railway Company, and for the benefit of the Great Northern Railway Company and its stockholders. None of said organizations and none of the pretended agreements, hereinbefore referred to, transfering, leasing, or otherwise affecting said docks, or the operation of trains over them, or payments, as rentals or otherwise, had any substance or reality. There were no divisions of earnings between any of said corporations and the Great Northern Railway Company. The Great Northern Railway Company simply [fol. 296] operated said line as a whole, for its own use and benefit, and for the use and benefit of its stockholders, and it never by any of said agreements, conveyances or transfers, including transfers of capital stock, parted with its absolute control and dominion over said ore line, or any part thereof.

20

All of the receipts, on account of the services of hauling ore from said mines to and including the delivery of the same upon the boats at Allouez Bay, accruing to the East-

ern Railway Company of Minnesota between January 1, 1901, and May 1, 1902, and such receipts accruing to the Great Northern Railway Company between May 1, 1902, and December 31, 1912, were earnings derived from the operation of such ore line and were earnings on interstate business passing out of the state, and were gross earnings which should have been reported for taxation, upon a mileage pro rate proportion without deduction.

21

For the year 1901, and for that part of the year 1902, prior to May 1, 1902, the Eastern Railway Company of Minnesota filed with the proper state officials, reports, purporting to be reports of its gross earnings for taxation, which said reports purported to include all of the taxable earnings received by said company on account of the operation [fol. 297] of the said ore line. It failed to include in said reports all of the earnings received by it on account of the operation of said ore line, deducting and omitting therefrom, twenty-five cents for each ton of ore moved. It was taxed and paid its tax, in accordance with its said reports, and it failed to pay taxes upon the proper proportion (81.55%) of said omissions.

22

For the year 1902, beginning with May 1, 1902, and for each succeeding year thereafter, to and including the year 1912, the Great Northern Railway Company filed with the proper officials of the State of Minnesota, reports purporting to be reports of its gross earnings for taxation, which reports, purported to include all of the taxable earnings received by it on account of the operation of the said ore line. It failed to include in said reports all of the earnings received on account of the operation of said ore line, deducting and omitting therefrom twenty-five cents for each ton of ore moved, from May 1, 1902, to July 31, 1909, twenty-two cents for each ton of ore moved, between August 1, 1909, and December 26, 1911, and fifteen cents for each ton of ore moved, between December 26, 1911, and December 31, 1912. It was taxed and paid its taxes in accordance with said reports, and it failed to pay taxes upon the proper proportion (81.55%) of said omissions.

[fol. 298] The omissions from said taxable earnings, arising out of the operations of said ore line, described in paragraphs No. 21 and 22, based upon the number of tons of ore hauled at the rates per ton of deduction, hereinbefore specified, and the percentage thereof apportionable to Minnesota, with the taxes collectible thereon, at the rates provided for by law, for each of the years involved in this proceeding, were and are as follows:

[fol. 299] Year	Omitted earnings	81.55%	Rate	Tax
1901	$232,088.58	$189,268.24	3%	$5,678.05
1902	1,046,417.02	853,353.08	"	25,600.59
1903	999,928.89	815,442.01	"	24,463.26
1904	1,043,321.17	850,828.41	"	25,524.85
1905	1,280,321.84	1,044,102.46	4%	41,764.10
1906	1,522,272.93	1,241,413.57	"	49,656.54
1907	1,857,318.26	1,514,643.04	"	60,585.72
1908	890,888.96	726,519.95	"	29,060.80
1909	1,521,079.51	1,240,440.34	"	49,617.61
1910	1,856,005.28	1,513,572.31	"	60,542.89
1911	2,154,196.53	1,756,747.27	"	70,269.89
1912	2,087,520.46	1,702,372.94	"	68,094.92
	$16,491,359.43	$13,448,703.62		$510,859.22

[fol. 300] On or about August 30, 1913, the Public Examiner of the State of Minnesota reported to the State Tax Commission of the State of Minnesota the omission of all of the foregoing earnings growing out of the operation of said ore line, and reported his findings thereon; that all of said earnings were taxable earnings, and that the Great Northern Railway Company should be taxed thereon in the amounts and for the years specified in the last preceding paragraph. Thereupon said Tax Commission fixed the amount of said omitted gross earnings, as in said paragraph specified, and assessed said taxes thereon, fixing as aforesaid, the amount of said tax, in the sum of $510,859.22, added thereto a penalty in the sum of $25,542.96, made official entry thereof, and certified the amount of said taxes, together with said penalty, to the State Auditor. On the 2nd day of September, 1913, the State Auditor made a draft on defendant, Great Northern Railway Company for the full amount of said tax, with penalty, to-wit: for the said amount, $536,402.18, and placed the same in the hands of the State Treasurer for collection. The State Treasurer, on September 4, 1913, notified defendant, Great Northern Railway Company, of the claim of the State, and of said

draft, and demanded payment thereof, with interest thereon at the rate of 1% per month from April 23, 1913. That no part of said taxes assessed on account of said omitted earnings has been paid.

[fol. 301] 25

There is no evidence before the Court from which the Court may determine how much of the earnings of said ore line for the year 1902, prior to May 1st thereof, were reported by the Eastern Railway Company of Minnesota for taxation, or how much of the earnings of said ore line for the year 1902, after May 1st thereof, were reported for taxation by the defendant, Great Northern Railway Company. And similarly there is no evidence before the Court separating the respective omissions of earnings of said companies on account of the operation of said ore line during said year 1902.

As conclusions of law, it is determined:

1

That the defendant, Great Northern Railway Company is indebted to the State for taxes for omitted earnings in the following amounts for the years specified, to-wit:

Year	Tax
1903	$24,463.26
1904	25,524.85
1905	41,764.10
1906	49,656.54
1907	60,585.72
1908	29,060.80
1909	49,617.61
1910	60,542.89
1911	70,269.89
1912	68,094.92
	$479,580.58

[fol. 302] and that the State of Minnesota is entitled to have and recover from the defendant the aggregate amount of said taxes, to-wit: the sum of $479,580.58.

2

It is further determined, since there was no assessment of taxes against the Eastern Railway Company of Minnesota for the year 1901, or for that part of the year 1902 prior to May 1st thereof, that there can be no recovery of taxes for said period, in this proceeding, from the Great Northern Railway Company on account of its assumption of the liabilities of said Eastern Railway Company of Minnesota, or otherwise, and the defendant herein is entitled to a dismissal of this action insofar as omissions of earnings and taxes for said period are involved herein; such dismissal to be without prejudice, and not upon the merits.

3

It is further determined that since no evidence was offered upon which the Court can determine how much of the earnings for the year 1902 were received after May 1, 1902, that the State is not entitled to recover from the defendant taxes charged against the defendant for the year 1902 and said defendant is entitled to a dismissal of this action, insofar as the same involves taxes assessed upon the basis of omitted earnings for 1902; said dismissal to be without prejudice, and not upon the merits.

[fol. 303]

4

It is further determined that the State of Minnesota is not entitled to recover any penalty or interest on account of any omitted earnings or taxes for said years 1903 to 1912, inclusive.

5

And it is determined that the plaintiff have and recover its costs and disbursements herein.

Let judgment be entered accordingly.

Dated this 30th day of September, 1922.

Hugo O. Hanft, Judge of District Court.

Stay of sixty days.

IN DISTRICT COURT OF RAMSEY COUNTY

MOTION FOR NEW TRIAL

To the above-named plaintiff and to Messrs. Clifford L. Hilton, Egbert S. Oakley and Patrick J. Ryan, its attorneys:

Please take notice that at a special term of the above-named court, to be held at the court house in the City of St. Paul on Saturday, November 4, 1922, at ten A. M., or as soon thereafter as counsel can be heard, the defendant herein will apply to the court (Hanft, J.) for an order setting aside the findings and decision made and filed September 30, 1922, and granting a new trial of this action, which motion will be made upon the settled case and upon all the files and records in this action, and upon the following grounds:

[fol. 304] I

That said findings and decision are not justified by the evidence.

II

That said findings and decision are contrary to law.

If said motion should be denied, at the same time and place defendant will apply to the court for an order amending its findings of fact herein as follows:

I

Strike out the word "exclusively" in the seventh line of finding No. 2, and insert in lieu thereof the word "principally."

II

Strike out the word "nominally" in the fourth line of finding No. 6.

III

Strike out the word "nominal" in the first and third lines of finding No. 7.

IV

Strike out the words "in form" in the second line of finding No. 9.

V

Amend finding No. 12 so as to read as follows:

"The Duluth, Superior & Western Terminal Company, prior to January 1, 1901, entered into an oral agreement [fol. 305] with the Eastern Railway Company of Minnesota, by which said Eastern Railway Company of Minnesota undertook to pay said Duluth, Superior & Western Terminal Company, the arbitrary sum of twenty-five cents per ton for each tone of ore hauled by said Eastern Railway Company of Minnesota over that part of this ore line reaching from Saunders to the docks. This agreement was kept in existence until the operation of said ore line by said Eastern Railway Company of Minnesota gave way, on May 1, 1902, to the operation thereof by the Great Northern Railway Company, and said agreement was renewed orally, between said Duluth, Superior & Western Terminal Company and said Great Northern Railway Company to continue in effect until June 1, 1903."

VI

Strike out the word "pretending" in finding No. 15.

VII

Strike out the word "pretending" in the second line and the word "pretended" in the sixth line of finding No. 16.

VIII

Strike out the word "pretended" in the first line of finding No. 17; strike out the words "pretended to sell and transfer" in the eleventh line and insert in lieu thereof the words "sold and transferred," and strike out the words [fol. 306] "pretended to transfer and return" in the third line from the bottom of said finding No. 17 and insert in lieu thereof the words "transferred and returned."

IX

Strike out all of finding No. 18 except the first six lines thereof and ending with the words "and for no other purpose."

X

Strike out of finding No. 19 the sentence, "It did not merely own the stocks of these companies"; and strike out the sentence, "None of said organizations and none of the pretended agreements, hereinbefore referred to, transfering, leasing, or otherwise affecting said docks, or the operation of trains over them, or payments, as rentals or otherwise, had any substance or reality." Add to the following sentence in said finding No. 19, "There were no divisions of earnings between any of said corporations and the Great Northern Railway Company," the following:

"except by way of payments of twenty-five cents per ton from May 1, 1902, to July 31 1909, twenty-two cents per ton between August 1, 1909, and December 25 1911, and fifteen cents per ton between December 26, 1911, and December 31, 1912." Amend the last sentence of said finding so as to read as follows:

"The Great Northern Railway Company and its sub-
[fol. 307] sidiary corporations operated said line and said ore docks for its and their own use and benefit and for the use and benefit of its and their stockholders."

XI

Strike out finding No. 20 and insert in lieu thereof the following:

"The services for which said amounts of twenty-five cents, twenty-two cents and fifteen cents per ton were paid, consisting of switching, docking, sorting, drying and unloading ore from cars into pockets and from such pockets into the holds of vessels for shipment to eastern points. The reasonableness of such payments for the services performed is not contested by the State or made an issue in this action. The evidence is undisputed and I so find, that the Eastern Railway Company of Minnesota and the Great Northern Railway Company actually paid for such serv-

ices to the Duluth, Superior & Western Terminal Company and to the Allouez Bay Dock Company during the period 1901 to 1912, inclusive, the sum of $16,491,359.43."

XII

Strike out conclusion of law No. 1.

XIII

Insert in lieu of conclusion of law No. 5 the following:

"It is determined that the plaintiff is not entitle to any [fol. 308] recovery in this action, and that the defendant is entitled to judgment for its costs and disbursements herein.

"Let judgment be entered accordingly."

Yours Respectfully, M. L. Countryman, F. G. Dorety, Attorneys for said Defendant.

Dated October 13, 1922.

The Court said, at page 112:

"I take it, under the evidence, the court will simply find that there was such a division; there is no evidence whatever that it is unreasonable, so that wouldn't come into the case at all."

In District Court of Ramsey County

Amended Findings

The above entitled matter came duly on to be heard at special term December 23, 1922, Messrs. M. L. Countryman and F. G. Dorety appearing as counsel for defendant and Messrs. P. J. Ryan, Clifford L. Hilton and Egbert S. Oakley appearing as counsel for plaintiff. Said matter came on to be heard upon application for an order setting aside the Court's findings and decision made and filed September 30, 1922, and granting a new trial of this action, or if that be denied, for an order amending its findings of fact and conclusions of law, all as per the motion papers herein filed.

[fol. 309] Upon the settled case and upon all the files and records in this action, and upon the oral arguments had at the hearing of said application, together with the briefs submitted after the original trial of said cause, it is hereby ordered that said findings of fact be and the same hereby are amended in the following particulars:

I

Finding No. 2 is amended (in response to paragraph No. 1 of the Notice of Motion) at the 7th line thereof by striking out the sentence:

"This line was used exclusively for hauling ore from these mines to said docks."

and inserting in lieu thereof the following:

This line was used principally for hauling ore from those mines to said docks; trains other than ore trains were operated over parts of the line, but not over that portion between Saunders, Wisconsin, and the docks.

II

Finding No. 19 is amended (in response to both paragraphs No. X and to paragraph XI of the Notice of Motion) at the 23rd line thereof by striking out the sentence:

"There were no divisions of earnings between any of said corporations and the Great Northern Railway Company,"

and inserting in lieu thereof the following:

[fol. 310] There were no real divisions of earnings between any of said corporations and the Great Northern Railway Company notwithstanding there were forms of agreement entered into and book entries formally made, specifying divisions of twenty-five cents per ton from May 1, 1902, to July 31, 1909, twenty-two cents per ton between August 1, 1909, and December 25, 1911, and fifteen cents per ton between December 26, 1911, and December 31, 1912, as hereinbefore described; and by inserting immediately after the foregoing the following:

The reasonableness of such pretended divisions is immaterial. If they were reasonable the burden of showing them to be so was upon the defendant, and the defendant did not show that such divisions, if real, were reasonable.

Save as herein granted, said motion is in all respects denied.

Hugo O. Hanft, Judge District Court.

Dated February 13, 1923.
Stay 60 days.

[fol. 311] In District Court of Ramsey County

Judgment

This Court having heretofore, under date of September 30, 1922, after trial of the above entitled action, made and filed its Findings of Fact and Conclusions of Law and Order for Judgment herein, and having, on February 13, 1923, made and filed herein its order amending certain of its said Findings, now, pursuant to said Findings of Fact and Conclusions of Law, and said order amending said Findings of Fact, and pursuant to said Order for Judgment, and upon motion made, It Is Ordered, Adjudged and Decreed:

I. That plaintiff, State of Minnesota, have and recover from said defendant, Great Northern Railway Company, the sum of Four hundred seventy-nine thousand five hundred eighty dollars and fifty-eight cents ($479,580.58) taxes, and the further sum of Thirteen thousand one hundred eight dollars and fifty-two cents ($13,108.52) interest on the above amount at the rate of six per cent (6%) per annum from September 30, 1922, to the date hereof.

II. That the application of the State of Minnesota for judgment against the defendant for and on account of taxes for the year 1901 and for that part of the year 1902 prior to May 1st thereof, be and the same is hereby denied, and that insofar as omissions of earnings and taxes for said [fol. 312] periods are involved herein, this action be and the same hereby is dismissed without prejudice and not on its merits.

III. That the application of the State of Minnesota for judgment against this defendant for taxes assessed on account of earnings for the year 1902 subsequent to May 1, 1902, be and the same is hereby denied, and that insofar as this action involves taxes assessed on the basis of said omitted earnings for said period in the year 1902, the same be and hereby is dismissed without prejudice and not on its merits.

IV. That the application of the State of Minnesota for judgment for penalty and interest on account of any omitted earnings or taxes for the years 1903 to 1912 inclusive, be and the same is hereby denied.

N. C. Robinson, Clerk of District Court of Ramsey County, Minnesota, by G. A. Johnson, Deputy.

Dated this 14th day of March, 1923.

Form of the foregoing judgment approved this 14th day of March, 1923.

Hugo O. Hanft, Judge of District Court.

[fol. 313] In District Court of Ramsey County

Notice of Appeal

To Messrs. Clifford L. Hilton, Egbert S. Oakley, and Patrick J. Ryan, attorneys for plaintiff:

Sirs: You will please take notice that defendant, Great Northern Railway Company, appeals to the Supreme Court of the State of Minnesota from that part of that certain judgment entered in the office of the Clerk of the District Court of Ramsey County, Minnesota, on the 14th day of March, 1923, whereby it was Ordered, Adjudged and Decreed, as follows:

"I. That plaintiff, State of Minnesota, have and recover from such defendant, Great Northern Railway Company, the sum of Four hundred seventy-nine thousand five hundred eighty dollars and fifty-eight cents ($479,580.58) taxes, and the further sum of Thirteen thousand one hundred eight dollars and fifty-two cents ($13,108.52) interest

on the above amount at the rate of six per cent (6%) per annum from September 30th, 1922, to the date hereof."

M. L. Countryman, F. G. Dorety, Attorneys for Defendant, 1120 Great Northern Bldg., Saint Paul, Minnesota.

Dated March 23, 1923.

[fol. 314] In District Court of Ramsey County

Stipulation Waiving Bond

It is hereby agreed and stipulated by and between the above named parties and their respective attorneys, that, whereas defendant desires to appeal to the Supreme Court of the State of Minnesota, bond for costs on such appeal and supersedeas bond shall be in all things waived and all proceedings herein are to be stayed until the final termination of this appeal.

Clifford L. Hilton, Egbert S. Oakley, Patrick J. Ryan, Attorneys for Plaintiff. M. L. Countryman, F. G. Dorety, Attorneys for Defendant.

Dated March 23, 1923.

[fol. 314a] In Supreme Court of Minnesota

No. 23542

State of Minnesota, Respondent,

v.

Great Northern Railway Company, Appellant

Writ of Error

United States of America, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said

Supreme Court of the State of Minnesota before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Great Northern Railway Company, appellant, and State of Minnesota, respondent, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of its validity, a manifest error hath happened to the great damage of the said Great Northern Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send [fols. 314b & c] record and proceeds aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within thirty (30) days from the date hereof, said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right according to the laws and customs of the United States should be done.

Witness The Honorable William Howard Taft, Chief Justice of the United States, this 26th day of March, in the year of our Lord one thousand nine hundred and twenty-eight.

——, ——, Clerk of the Supreme Court of the United States, by Joel M. Dickey, Clerk of the District Court of the United States for the District of Minnesota. (Seal.)

Allowed by S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[fols. 315-316a] Citation, in usual form, showing service on G. A. Youngquist, filed March 26, 1928, omitted in printing.

[fol. 317] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

STIPULATION FOR APPROVAL OF BOND—Filed Mar. 26, 1928

It is hereby stipulated by and between the above entitled parties, by their respective attorneys, that the bond of the Great Northern Railway Company, as principal, and without sureties, in the penal sum of seven hundred thousand dollars ($700,000), filed with the petition for writ of error herein, may be approved by the above entitled court and may operate as a supersedeas bond in this action, with the same effect as though said bond were executed by duly qualified sureties.

G. A. Youngquist, Attorney General of the State of Minnesota, Patrick J. Ryan, Attorneys for Respondent. F. G. Dorety, Thomas Balmer, Attorneys for Appellant.

Dated March 26, 1928.

[fols. 318-319a] Bond on writ of error for $700,000, approved and filed March 26, 1928, omitted in printing.

[fol. 320] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Mar. 26, 1928

The above entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner and filed with its petition be and the same is hereby approved, and further proceedings under the judgment rendered by this court in said action are hereby stayed pending the receipt of mandate herein from the Supreme Court of the United States, and no remittitur shall be made herein to the District Court of Ramsey County pending the receipt of such mandate.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

Dated March 26, 1928.

[File endorsement omitted.]

[fol. 321] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Mar. 26, 1928

Now comes the said appellant and plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above entitled matter there was manifest error, in this to-wit:

First. The said court erred in holding that Section 1669 of the General Statutes of Minnesota for 1894 and Chapter 253 of the General Laws of Minnesota for 1903 are not in conflict with Section 8 of Article I of the Constitution of the United States.

Second. The said court erred in holding that the provisions of said statutes are not in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. The said court erred in construing the said statutes as imposing a tax upon revenues collected by the plaintiff in error on behalf of and paid to its subsidiary Wisconsin corporation for services performed by that corporation other than a railroad haul and performed entirely without the State of Minnesota.

[fol. 322] Fourth. The said court erred in holding that the said tax sought to be collected herein and the statute as construed by the court authorizing the same, did not impose an undue and unreasonable burden upon interstate commerce.

Fifth. The said court erred in holding that the said tax sought to be collected herein and the statute as construed by the court authorizing the same, did not deprive the plaintiff in error of property without due process of law.

Sixth. The said court erred in holding that the said tax sought to be collected herein and the statute as construed by the court authorizing the same, did not deny to the plaintiff in error the equal protection of the law.

Seventh. The said court erred in denying to the plaintiff in error the immunity claimed by it, under Section 8 of Article I of, and under Section 1 of the Fourteenth Amendment to, the Constitution of the United States, from the tax sought to be imposed upon it in this action.

Eighth. Said court erred in failing to hold that the said statutes violate the said provisions of the United States Constitution and are, therefore, invalid, and that there is no authority in law for the collection of the tax sought to be imposed by the defendant in error in this action.

Ninth. The said court erred in holding that said tax sought to be collected herein, is not a tax on property in a state other than Minnesota.

Tenth. The said court erred in holding that "at the trial it was not urged that the so-called gross earnings tax was unconstitutional and no evidence was offered for the purpose of showing it to be so."

Eleventh. The said court erred in holding that "no evidence was offered at the trial upon the relative values of

the defendant's property in Minnesota and in Wisconsin as compared with mileage in support of a claim of uncon-
[fol. 323] stitutionality." And in holding that the evidence of investment in the property in Minnesota and in that in Wisconsin was "apparently upon the theory that it was reasonable to allocate to a subsidiary or an allied or owned company 25 or 22 or 15 cents per ton for the lower end of the haul, or to deduct such sum as a service charge." And in holding that "the evidence as to value of specific portions of the ore line is far from satisfactory." And that "neither party considered these matters of anything but incidental or trivial consequence and of no constitutional bearing for there was no constitutional question."

Twelfth. Said court erred in holding that "there was no claim of unconstitutionality either in the trial court or in this court on appeal or on the first motion for reargument."

Thirteenth. Said court erred in holding that the plaintiff in error took no account of other traffic moving over the line of railroad, the earnings from which are sought to be taxed in this action, and in holding that the said tracks carry traffic other than the iron ore, the earnings from which are sought to be taxed in this case, and in holding that none of such other traffic can reach the docks or depots of the plaintiff in error at Superior or Duluth without passing over tracks which carry iron ore.

Fourteenth. Said court erred in holding that "there is nothing to tell us * * * what the use value is of trackage employed in common by ore and non-ore traffic, and how it should be apportioned." And in holding that "the evidence gives us no basis for the apportionment of its value according to use by ore and non-ore traffic."

Fifteenth. Said court erred in holding that the ore trackage of the plaintiff in error could not be considered one road and "if it could be there apparently would be a government recapture."

Sixteenth. Said court erred in holding that in 1912, the ore trackage of the plaintiff in error "was making over eight million dollars per annum on a 107 mile haul, or
[fol. 324] earnings of $78,000 per mile, all for a six months

year, and for a traffic which moved rapidly and easily." And in holding that "if earnings at all comparable were spread over its 2,000 miles of mileage in Minnesota they would be fabulous."

Seventeenth. Said court erred in holding that the road of the plaintiff in error "has a unitary value which cannot be disregarded because one mile costs for construction more than others."

Eighteenth. Said court erred in holding that "the road which has the privilege of carrying the ore, whether through direct ownership or indirect ownership or control through subsidiaries, or through contracts with mines in which it is not interested, makes the earnings. No other could. Without such ownership or control or contracts ore carrying roads would not have their present value nor make their present great earnings."

F. G. Dorety, Thomas Balmer, Attorneys for Plaintiff in Error.

[fol. 325] In Supreme Court of Minnesota

No. 23542

[Title omitted.]

Petition for Writ of Error—Filed Mar. 26, 1928

To the Honorable Samuel Wilson, Chief Justice of the Supreme Court of the State of Minnesota:

Your petitioner, Great Northern Railway Company, the appellant in the above entitled action, respectfully alleges and shows:

On March 23, 1928, final judgment was entered by the Supreme Court of the State of Minnesota in the above entitled suit, then pending in said court, in favor of the State of Minnesota and against your petitioner in the sum of $641,234.85, affirming a judgment of the District Court of the Second Judicial District, Ramsey County, Minnesota, in favor of the State of Minnesota and against your peti-

tioner in the sum of $479,580.58, and the further sum of $13,108.52, interest on the above amount.

That the said Supreme Court of the State of Minnesota was then and there the highest court of said state in which a decision in said suit could be had; that there was drawn in question in said suit the validity of a statute of the said State of Minnesota, to-wit: Section 1669 of the General Statutes of Minnesota for 1894 and Chapter 253 of the General Laws of Minnesota for 1903, on the ground that said [fol. 326] statute was repugnant to the Constitution of the United States, and the decision in said suit was in favor of said validity; that an immunity from taxation was set up and claimed in said suit by your petitioner under the Constitution of the United States and that said immunity was denied in and by said decision.

That the said statute of the State of Minnesota purports to levy a tax on the gross earnings of railway companies from business beginning and ending in the State of Minnesota, and where such business passes through, into or out of the state, on a proportion of the gross earnings from such business equal to the proportion which the mileage within the state bears to the total mileage over which such business is done.

That your petitioner was at all times herein mentioned a railway company and owned a line of railroad extending from certain iron mines in the northern part of the State of Minnesota to certain docks located upon the shore of Lake Superior at Allouez in the State of Wisconsin. That approximately 81.55% of the mileage of said line of railway was in the State of Minnesota; that during the years 1903 to 1912, inclusive, your petitioner owned or controlled the stock and operations of a subsidiary Wisconsin corporation, hereinafter referred to as the Dock Company, which owned and operated railroad yards and steamship docks, including tracks for the sorting and classification of carloads or iron ore and including on said docks pockets and compartments for the sorting, mixing, grading and storage of iron ore and for the receiving of iron ore from railway cars and the transfer of the same to steamships, said yards and dock connecting with and being operated in connection with the said line of railway of your petitioner. That during said years your petitioner collected and re-

ceived from shippers of iron ore from said mines, a charge varying from 80 cents to 60 cents per gross ton for the entire service of the hauling by petitioner of iron ore from [fol. 327] said Minnesota mines to said Lake Superior port in Wisconsin, and of the classifying, sorting, mixing, grading, storage and loading on steamships of said ore by said Dock Company, all under an agreement between petitioner and said Dock Company, whereby the petitioner accounted for and paid over to said Dock Company its portions of the charge collected by petitioner from said shippers, said portions so paid and agreed to be paid to said Dock Company varying from 25 cents per ton to 15 cents per ton. That during all of said years your petitioner reported 81.55% (its track mileage proportion in Minnesota) of the earnings collected and retained by it as aforesaid to the State of Minnesota, and paid the full amount of tax thereon required by the said statute. That this action was brought to compel petitioner to report to the State of Minnesota 81.55% (its own track mileage proportion) of the earnings paid to said Dock Company as aforesaid, and to compel petitioner to pay thereon the gross earnings tax specified in said statute.

That the docks, storage and grading compartments, classification yards, and other facilities, by which said Dock Company performed its said service, were located entirely in the State of Wisconsin. That the services rendered by said Dock Company, for which its portion of said revenues was collected and received, were rendered entirely in the State of Wisconsin and while said ore was in transit in interstate commerce; that the portion of said Dock Company's service, which consisted of unloading said ore from cars and transferring same to steamships, was a necessary incident to and part of the transportation of said ore in interstate commerce to destinations in other states, and that the balance of said Dock Company's services consisted of the sorting, mixing and grading of said ore for the purpose of making the same more merchantable upon arrival at its ultimate destination in other states.

In paragraphs 6 and 7 of its amended answer in this [fol. 328] proceeding your petitioner set up and alleged that the attempt of the state of Minnesota to levy the tax here in question was in contravention of Section 8 of Article I of the Constitution of the United States and of Section 1

of the Fourteenth Amendment to the Constitution of the United States, in that the statute as construed by the state would impose a burden upon interstate commerce and would deny to the defendant due process of law and the equal protection of the law.

That in its said decision the Supreme Court of the State of said ore over the petitioner's line of railway, but for the petitioner's said track mileage proportion of all revenues collected by petitioner on its own behalf, as well as on behalf of the said Dock Company, not only for the hauling of said ore over the petitioner's line of railway, but, for the classifying, sorting, mixing, grading and storage of said ore and for the transfer of same from railway cars to steamships, all of which was done in the State of Wisconsin. That said statute as so construed by the Supreme Court of the State of Minnesota violates Section 8 of Article I of the Constitution of the United States in taxing the proceeds of interstate commerce, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States in taxing property outside of the State of Minnesota, in taxing revenues derived by petitioner from property outside of the State of Minnesota, and in denying to petitioner due process of law and the equal protection of the law, all as more particularly specified in the Assignment of Errors filed herewith.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Minnesota and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected and said judgment reversed, and your petitioner discharged.

Dated at St. Paul, Minn., March 26, 1928.

Great Northern Railway Company, Petitioner, by F. G. Dorety, Thomas Balmer, Attorneys for Petitioner.

[fol. 328a] [File endorsement omitted.]

[fol. 329b] Certificate of lodgment omitted in printing.

[fol. 330] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

SUPPLEMENTAL ORDER VACATING JUDGMENT—Filed July 19, 1927

It appearing that by its Answer in this action the appellant drew in question in this suit the validity of Section 1669 of the General Statutes of Minnesota for 1894, and of Chapter 253 of the General Laws of Minnesota for 1903, on the ground that said statutes were repugnant to the Constitution of the United States; and that the defendant by its supplemental petition for reargument filed herein on December 19, 1924, presented said question to the court and that the court actually considered said contention of the appellant that said statutes were repugnant to the Constitution of the United States and actually decided in favor of the validity of said statutes.

And it further appearing that the order denying said petition for reargument entered herein on April 17, 1925, and also the final judgment herein dated and signed May 13, 1925, did not show that the said constitutional questions had in fact been considered and decided by the court; and it being necessary that the record herein show that the decision of this court was in favor of the validity of said stat-
[fol. 331] utes, in order that the said decision of this court may be reviewed by writ of error to the Supreme Court of the United States; and it appearing that the time allowed by law and the rules of court for filing a petition for writ of error to review the said judgment of May 13, 1925, has now expired, and this court having on July 8, 1927, made its order herein granting a reargument of the said constitutional questions,

Now, therefore, to the end that the said omission in the record may be supplied by showing that this court did in fact determine the Federal constitutional question raised by appellant in its answer and supplemental petition for

reargument herein and did in fact decide in favor of the validity of said statutes, and to the end that a judgment may be entered herein, after the supplying of such omissions in the record, in such form that the same may be subject to review by the Supreme Court of the United States upon writ of error,

It is ordered that the order entered herein on April 17, 1925, denying appellant's petition for reargument, and the final judgment entered herein on May 13, 1925, be and the same hereby are vacated and set aside pending the decision of this court upon the reargument granted herein by order of the court dated July 8, 1927.

Dated at Saint Paul, Minnesota, July 18, 1927.

S. B. Wilson, Chief Justice.

[File endorsement omitted.]

[fol. 332] [File endorsement omitted]

In Supreme Court of Minnesota

23542

State of Minnesota, Respondent,

vs.

Great Northern Railway Company, Appellant

No. 375, Ramsey County, Dibell, J.

Syllabus

The Minnesota tax on railroads, based on gross earnings, is a property tax and is constitutional when the statutory mileage prorate is applied to the iron ore tonnage originating in Minnesota and carried by the defendant and loaded into the boats from its docks in Allouez Bay on the Wisconsin shore of Lake Superior.

Judgment affirmed

Opinion—Filed March 2, 1928

Our original opinion affirming the judgment of the district court for omitted taxes of the defendant is reported

in 160 Minn. 515. A motion for reargument was denied. An appeal was taken to the Supreme Court of the United States and it was there dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of the claim of a substantial federal constitutional question in the court below. 47 S. Ct. R. 343. Thereafter, on motion of the defendant, we vacated our judgment of affirmance and granted defendant's supplemental motion for a reargument that it might urge a claim that the tax statute was unconstitutional under the federal constitution. — Minn. —, 214 N. W. 799. The hearing now before us is upon such claim. The evidence and record are the same.

The statute defines the gross earnings of a railroad within the state as "all earnings on business beginning and ending within the state, and a proportion, based upon the [fol. 332a] proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state." G. S. 1923, § 2247. Every railroad pays into the treasury, in lieu of a tax on all property within the state owned or operated for railway purposes, a sum of money equal to a stated per cent. of its gross earnings. G. S. 1923, § 2246. There is no local levy or other tax. The proceeds of the railroad tax go into the general revenue of the state. The state is a single taxing unit. There is no local distribution.

The so-called gross earnings tax is a property tax. The amount of it is measured by gross earnings. It is not a tax on gross earnings accruing on traffic in or out of Minnesota. It is not a tax on property in a state other than Minnesota. That a tax on property may be computed on the basis of gross earnings, as is not unusual in the case of railroads and other common carriers and telephone and telegraph companies, is not longer questioned. Cudahy Packing Co. v. Minnesota, 246 U. S. 450, affirming 129 Minn. 30; U. S. Express Co. v. Minnesota, 223 U. S. 335, affirming 114 Minn. 346. A property tax measured by gross earnings may be really a subterfuge and so disregard value or so burden interstate commerce that it is unconstitutional. A so-called gross earnings tax may be constitutional or it may be so drawn as to be unconstitutional.

Maine v. Grand Trunk R. Co. 142 U. S. 217; Pittsburgh &c. R. Co. v. Backus, 154 U. S. 421; Pullman Co. v. Richardson, 261 U. S. 330; Wisconsin &c. R. Co. v. Powers, 191 U. S. 379; Fargo v. Hart, 193 U. S. 490; Oklahoma v. Wells, Fargo & Co. 223 U. S. 298; Southern Ry. Co. v. Kentucky, 71 L. Ed. 574.

The valuation of railroad property for taxation is difficult. At the best it is an approximation and not an exact [fol. 332b] determination. That there is a relation worthy of consideration in taxation between gross earnings and mileage is generally conceded.

At the trial it was not urged that the so-called gross earnings tax was unconstitutional and no evidence was offered for the purpose of showing it to be so. The defendant made certain deductions for seven miles of the haul at the lake end before the application of the statutory prorate upon the theory that it had a contract with the Allouez Bay Dock Company or its predecessor for a carriage of such distance; or if it did not that it was entitled to make such a deduction as a service charge. In short, it applied the statutory prorate in a proportion of 87 to 107, the Minnesota and the total mileage, but deducted certain sums which it claimed represented either the contract price or value for the carriage for the last seven miles.

The trial court found that the defendant's ore line from the mines in Minnesota to the water front on Allouez Bay in Wisconsin was a single continuous railway line for which a single charge for a continuous and unbroken railway service from mine to boat was made. It found that it was a Great Northern operation and in effect a Great Northern ownership. The ore was carried for a fixed charge from the mines and put into boats in the waters of Lake Superior just as other roads carried ore and unloaded it in boats on the same waters. After 1906 the Great Northern published a tariff for a completed carriage. Before that its actual tariff, though not published, was for a continuous haul.

There was slight evidence that railroads at the head of the lakes during the period in question did not add to their tariff a charge for loading ore in to the boats, or make a service charge; and an offer by the state of plenary proof of such fact, framed with particularity, was excluded on [fol. 333] objection of the defendant. It is not out of place

to give the statement of the Interstate Commerce Commission in Lum v. G. N. Ry. Co. 33 I. C. C. 541, 554, made in 1915, when considering tariff rates on ore going to the head of the lakes and into the boats:

"The rate for the transportation of iron ore from the Vermillion, Mesabi, and Cuyuna ranges to the docks at Two Harbors, Duluth, Allouez Bay, and Superior is uniformly 60 cents per long ton regardless of distance. This rate covers the service from the mouth of mine or stock pile to the dock, the dumping of the ore into the dock, storage in the dock until a cargo is completed, and loading into the boats." Lum v. G. N. Ry. Co. 33 I. C. C. 541, 554.

On the former appeal we sustained the trial court's finding that the transfer from mine to boat was one haul undertaken by the Great Northern for a specific rate, all of which it received, though the lower end of the haul was under the name of a corporation all of the stock of which it owned and the profits of which it received in the form of dividends. The finding could hardly be different and the facts are noted in some detail in the former opinion.

The ore haul from the Mesabe mines, the source of the defendant's ore supply in Minnesota, was 107 miles to its ore docks on Allouez Bay, Wisconsin, 87 miles in Minnesota and 20 miles in Wisconsin, or 81.55 per cent in Minnesota. Prior to August 1, 1909, when the through rate was 80 cents per ton, there was deducted by the defendant for the dock haul and the six miles west to Saunders where the exclusive ore line branched to the dock 25 cents, leaving 55 cents for the long haul of 100 miles. From that date until December 25, 1911, the deduction was 22 cents, leaving 58 cents for the 100 mile haul. In 1912, when the rate was 60 cents, the deduction was 15 cents and the long haul was 45 cents. The railroad applied the mileage prorate of 81.55 per cent. after the deductions we have stated. In [fol. 334] other words, it deducted these sums from its gross earnings before it applied the statutory mileage prorate. We hear nothing further about the rate, except, as stated in the original opinion, there was a rate of 95 cents in 1919, with a storage and unloading charge of 5 cents; but, as there observed, there being in the period involved no ap-

preciable amount of ore going over the dock the 5 cents additional was insignificant. The real tariff was $1.00.

The defendant now bases its claim of unconstitutionality upon what it claims is a proportionate difference in value in the two states of the property used in carrying ore.

No evidence was offered at the trial upon the relative values of the defendant's property in Minnesota and in Wisconsin as compared with mileage in support of a claim of unconstitutionality. There was no claim of unconstitutionality either in the trial court or in this court on appeal or on the first motion for reargument. The claim in this court came in the supplemental petition for reargument after the dismissal of the appeal to the supreme court of the United States. Evidence was given of the investment of the company for the latter five years of the ten year period involved apparently upon the theory that it was reasonable to allocate to a subsidiary or an allied or owned company 25 or 22 or 15 cents per ton for the lower end of the haul, or to deduct such sum as a service charge. The defendant claimed that its books showed in 1912 an accumulated investment for the dock of $5,294,137; for trackage from the dock to the state line, $1,676,686; and thence to the mines in Minnesota, $10,878,951. There was a book showing of equipment investment of $7,178,051. The defendant gains no advantage from the equipment account. The only witness called for the defendant, entirely frank in his testimony, knew only that in some way these various figures were upon the books as representing investment. [fol. 335] They were figures for some purpose—for what purpose does not appear—or, as the witness puts it in explaining the figures for the five years, "it happened that these were compiled for another purpose and so I could get them without delay."

To maintain its claim of unconstitutionality the defendant in a way segregates 107 miles of its railway system, 87 miles from its 2,000 miles in Minnesota, and 20 miles from its mileage in Wisconsin. It does not do this quite completely. It takes no account of the grain traffic coming to the head of the lakes over its line through Hinckley to the west and southwest, nor from its Fosston branch which reaches northern Minnesota and the states farther west and Canada. It takes no account of incoming freight ex-

cept iron ore. It takes no account of outgoing freight. It takes no account of passenger traffic coming to the head of the lakes, either to Duluth of Superior, or originating there and going west over its lines. It takes account of one commodity, iron ore, and rejects all others. But all this incoming and outgoing passenger and freight traffic passes over the tracks which carry iron ore in Wisconsin, with the exception of seven miles. Its ore traffic passes from Saunders, Wisconsin, as far north as Swan River, or perhaps farther, in Minnesota, over tracks which carry through traffic, passenger and freight, both ways. There are branches or stubs in Minnesota which are exclusively for iron ore and the usual tracks in connection with open pit mines. None of its freight or passenger traffic can reach its docks or depots at Superior or Duluth without passing over tracks which carry iron ore. What the use value is of trackage employed in common by ore and non-ore traffic, and how it should be apportioned, there is nothing to tell us. We do know that a transcontinental line makes common use of much of the ore carrying trackage in reaching the head of the lakes and in going from it, and that it can not reach the great lakes except by using track-[fol. 336] age which its ore traffic uses in both Minnesota and Wisconsin.

The evidence as to the values of specific portions of the ore line is far from satisfactory. Whether the dock account of $5,294,137 was properly charged as respects capital or maintenance for taxing purposes we do not know. The trial court made no finding. It was not asked to do so. There was no inquiry. Neither party considered these matters of anything but incidental or trivial consequence and of no constitutional bearing for there was no constitutional question. If the Minnesota gross earnings tax is invalid as a whole, as it affects the defendant's 2,000 miles of trackage in Minnesota, or as it affects the 87 miles with its enormous tonnage and gross earnings, it should be found so after a definite inquiry into the facts. And we do not have them.

Whether the defendant claims that the gross earnings tax is wholly unconstitutional is not clear. It is in an apparent position to say that it does for it has not said that it does not. But there is nothing to show that it pays for

its whole mileage in the state more than it should upon a fair valuation. Nor is it a matter of concern what it pays in Wisconsin. The only question is whether it pays too much in Minnesota. More likely its claim is that the statute is unconstitutional as to the mileage prorate when applied to the 107 mile ore haul. The defendant urges that the 107 miles might well be considered as if a separate road. Of course it is not. The ore which it carries can get to its dock only by using a large part of its trackage used for other traffic. The evidence gives us no basis for the apportionment of its value according to use by ore and non-ore traffic. In its brief the defendant almost complains that the [fol. 337] ore trackage can not be considered one road. If it could be there apparently would be a government recapture; and since it can not be, the satisfactory earnings must contribute to the dividends of the whole line. They can not be separated so as to decrease taxes.

The taxing authorities must take gross earnings as they find them. They do not fix earnings. Back in 1912 when the rate was lower and the tonnage presumably much less, the road was making over $8,000,000 per annum on a 107 mile haul, or earnings of $78,000 per mile, all for a six months year, and for a traffic which moved rapidly and easily. If earnings at all comparable were spread over its 2000 miles of mileage in Minnesota they would be fabulous. Whatever bearing large earnings have on tariff rates they do not argue for a decrease of taxes. Large earnings give value and the road has a unitary value which can not be disregarded because one mile costs for construction more than others.

Our construction should favor sustaining the statute if reasonably it may be sustained for it is the result of a long sustained legislative policy. If it is unconstitutional it should fall. Minnesota has hardly known anything other than a tax measured by gross earnings. From territorial times a gross earnings tax has been a cherished privilege of railroad charters 6 Dunnell Minn. Dig. (2 ed.) §9541, et seq.; Edgerton Minnesota Railroad Laws. It has worked satisfactorily and without much litigation. In the litigation which has arisen the railroads have been found on the side of sustaining the statute. 6 Dunnell Minn. Dig. (2 ed.) §9543, et seq.

With the state and subordinate taxing bodies anxious for new sources of revenue and ad valorem or some other system might afford the taxing bodies additional revenue or induce attempts to get it. If the gross earnings system continues litigation should not be invited where large termi-
[fol. 338] nals are located near a state border and receive freight over a line where values on a mileage basis may be unequal. The property of the railroad is taxable at its value as a going concern. The ore traffic originates in Minnesota. The rate is not unduly competitive. The road which has the privilege of carrying the ore, whether through direct ownership or indirect ownership or control through subsidiaries, or through contracts with mines in which it is not interested, makes the earnings. No other could. Without such ownership or control or contracts ore carrying roads would not have their present value nor make their present great earnings. We cannot see that the statutory scheme of taxation is unconstitutional or that the tax which it imposes works a hardship upon the defendant through an excessive valuation. Such earnings give the defendant's property great value which reflects itself in taxes.

Judgment affirmed.

[fol. 339] IN SUPREME COURT OF MINNESOTA

23542

[Title omitted]

JUDGMENT—Filed Mar. 23, 1928

Pursuant to an order of the court heretofore duly made and entered in this cause, it is determined and adjudged that the judgment of the court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein do have and recover of appellant herein the sum and amount of six hundred forty-one thousand two hundred thirty-four and 85/100 dollars ($641,234.85), final

judgment in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed March 23, 1928.

By the Court. Attest:
Grace Kaercher Davis, Clerk, by Peter O. Scow, Deputy. (Supreme Court Seal.)

[File endorsement omitted.]

[fol. 340] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed April 4, 1928

To the Clerk of the above-entitled court:

You will please include in the transcript to be transmitted to the Supreme Court of the United States pursuant to the writ of error allowed to the above-named appellant in the above entitled cause to review a judgment rendered therein by the Supreme Court of the State of Minnesota, the following portions of the record:

In the District Court of Ramsey County, Minnesota

(1) Complaint.
(2) Amended answer.
(3) Amended reply.
(4) Settled case.
(5) Stipulation settling case.
(6) Order settling case.
(7) Stipulation adding defendant's Exhibit 2 to the settled case and order thereon.
(8) Findings of fact and conclusions of law.
(9) Motion for new trial and for amended findings.
(10) Amended findings and order denying new trial.
(11) Judgment.
[fols. 341 & 341a] (12) Notice of appeal.
(13) Stipulation waiving bond.

In the Supreme Court of the State of Minnesota

(1) Supplemental order vacating judgment.
(2) Opinion filed March 2, 1928.
(3) Judgment dated March 23, 1928.
(4) Petition for writ of error.
(5) Assignments of errors.
(6) Writ of error.
(7) Citation and service.
(8) Stipulation re approval of bond.
(9) Bond.
(10) Order allowing writ of error.
(11) This præcipe.

Dated April 4, 1928.

F. G. Dorety, Thomas Balmer, Attorneys for Appellant.

Service of the foregoing præcipe upon the State of Minnesota, the respondent therein named, is hereby acknowledged, and a copy of the said præcipe is received this 4th day of April, 1928, in the office of the Attorney General of the State of Minnesota.

G. A. Youngquist, Attorney General of the State of Minnesota.

[File endorsement omitted.]

[fol. 342] Certificate of Grace Kaercher Davis, Clerk of Supreme Court of Minnesota, to foregoing transcript, omitted in printing.

[fol. 343] In Supreme Court of the United States

No. 106

Statement of Points to be Relied on and Designation to Print Entire Record—Filed April 9, 1928

Now comes the Great Northern Railway Company, the above named plaintiff in error, pursuant to paragraph 9 of Rule 11 of the rules of the above entitled Court, and states that the points upon which it intends to rely in the above entitled proceeding are as follows:

1. That all income sought to be taxed in the above entitled proceeding was derived from operations forming portions of interstate commerce.

2. That all such income was derived from transactions carried on entirely outside the State of Minnesota and beyond the jurisdiction of said state.

3. That the earnings sought to be taxed against plaintiff in error in this proceeding were earnings of corporations other than plaintiff in error, and were not the earnings of plaintiff in error.

4. That the attempted tax upon the proceeds of interstate commerce would impose a burden upon interstate commerce in violation of Section 8 of Article I of the Constitution of the United States.

5. That the attempt to tax property and the income from property located entirely outside the State of Minnesota would result in taking property of the plaintiff in error without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the [fols. 344 & 344a] United States.

6. That the attempt to collect a tax from the plaintiff in error on the earnings of other corporations would result in denying to plaintiff in error the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff in error designates as the parts of the record which it considers necessary for the consideration of the above points, the entire record in this case as certified and transmitted to the above entitled Court by the Clerk of the Supreme Court of the State of Minnesota.

F. G. Dorety, Thomas Balmer, Attorneys for Plaintiff in Error, 1120 Great Northern Building, St. Paul, Minneosta.

Dated April 5, 1928.

Service of the foregoing statement and designation upon the State of Minnesota, the defendant in error therein named, is hereby acknowledged, and a copy of said state-

ment and designation is received this 5 day of April, 1928, in the office of the Attorney General of the State of Minnesota.

G. A. Youngquist, Attorney General of the State of Minnesota, by James E. Markham, Deputy Attorney General.

[fol. 344b] [File endorsement omitted.]

[fols. 345 & 345a] IN SUPREME COURT OF THE UNITED STATES

No. 107

STIPULATION THAT ONLY APPEAL PAPERS IN CASE NO. 107 BE PRINTED—Filed May 7, 1928.

It is hereby stipulated and agreed by and between the above named parties by their respective attorneys that since the judgment appealed from in the above entitled action is the same as the judgment brought up by writ of error in the case of Great Northern Railway Company v. State of Minnesota, No. 106, October Term 1927 in the above entitled court, and since the record in the trial court upon which said judgment is based is to be printed as a part of the record in said cause No. 106 the said record in the trial court need not be printed in this cause No. 107, and the printed record in this cause need include only the appeal papers. It is further stipulated and agreed that the record in the trial court as printed in said cause No. 106 may be regarded as a part of the record in this cause No. 107, and may be referred to and considered by the court as fully as though printed herein.

Dated at St. Paul, Minnesota, May 4, 1928.

G. A. Youngquist, Attorney General for the State of Minnesota; F. G. Dorety, Thomas Balmer, Attorneys for Appellants.

[fol. 345b] [File endorsement omitted.]

[fol. 346] IN SUPREME COURT OF MINNESOTA

No. 23542

STATE OF MINNESOTA, Respondent,

v.

GREAT NORTHERN RAILWAY COMPANY, Appellant

NOTICE OF APPEAL—Filed Mar. 26, 1928

To the State of Minnesota, respondent in the above-entitled proceeding:

Please take notice that the undersigned, appellant in the above entitled proceeding, appeals to the Supreme Court of the United States from the judgment rendered in said proceeding by the Supreme Court of the State of Minnesota.

Great Northern Railway Company, Appellant, by F. G. Dorety, Thomas Balmer, Its Attorneys.

Dated March 26, 1928.

Service of the foregoing notice upon the State of Minnesota, the respondent therein named, is hereby acknowledged this 26th day of March, 1928.

G. A. Youngquist, Attorney General, State of Minnesota, by James E. Markham, Deputy Attorney General, Patrick J. Ryan, Attorneys for Respondent.

[fol. 346a] [File endorsement omitted.]

[fol. 347] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed Mar. 26, 1928

To the Honorable Samuel Wilson, Chief Justice of the Supreme Court of the State of Minnesota:

Your petitioner, Great Northern Railway Company, the appellant in the above entitled action, respectfully alleges and shows:

On March 23, 1928, final judgment was entered by the Supreme Court of the State of Minnesota in the above entitled suit, then pending in said court, in favor of the State of Minnesota and against your petitioner in the sum of $641,234.85, affirming a judgment of the District Court of the Second Judicial District, Ramsey County, Minnesota, in favor of the State of Minnesota and against your petitioner, in the sum of $479,580.58, and the further sum of $13,108.52, interest on the above amount. That the said Supreme Court of the State of Minnesota was then and there the highest court of said state in which a decision in said suit could be had; that there was drawn in question in said suit the validity of a statute of the said State of Minnesota, to-wit: Section 1669 of the General Statutes of Minnesota for 1894 and Chapter 253 of the General Laws of Minnesota for 1903, on the ground that said statute was repugnant to the Constitution of the United States, and the decision in said suit was in favor of said validity; that an immunity from taxation was set up and claimed in said [fol. 348] suit by your petitioner under the Constitution of the United States and that said immunity was denied in and by said decision.

That the said statute of the State of Minnesota purports to levy a tax on the gross earnings of railway companies from business beginning and ending in the State of Minnesota, and where such business passes through, into or out of the state, on a proportion of the gross earnings from such business equal to the proportion which the mileage within the state bears to the total mileage over which such business is done.

That your petitioner was at all times herein mentioned a railway company and owned a line of railroad extending from certain iron mines in the northern part of the State of Minnesota to certain docks located upon the shores of Lake Superior at Allouez in the State of Wisconsin. That approximately 81.55% of the mileage of said line of railway was in the State of Minnesota; that during the years 1903 to 1912, inclusive, your petitioner owned or controlled the stock and operations of a subsidiary Wisconsin corporation, hereinafter referred to as the Dock Company, which owned and operated railroad yards and steamship docks, including tracks for the sorting and classification of

carloads of iron ore and including on said docks pockets and compartments for the sorting, mixing, grading and storage of iron ore and for the receiving of iron ore from railway cars and the transfer of the same to steamships, said yards and docks connecting with and being operated in connection with the said line of railway of your petitioner. The- during said years your petitioner collected and received from shippers of iron ore from said mines, a charge varying from 80 cents to 60 cents per gross ton for the entire service of the hauling by petitioner of iron ore from said Minnesota mines to said Lake Superior port in Wisconsin, and of the classifying, sorting, mixing, grading, storage and loading on steamships of said ore by said Dock Company all under an agreement between petitioner and said Dock Company, whereby the petitioner accounted for and paid over to said Dock Company its portion of the [fol. 349] charge collected by petitioner from said shippers, said portions so paid and agreed to be paid to said Dock Company varying from 25 cents per ton to 15 cents per ton. That during all of said years your petitioner reported 81.55% (its track mileage proportion in Minnesota) of the earnings collected and retained by it as aforesaid to the State of Minnesota, and paid the full amount of tax thereon required by the said statute. That this action was brought to compel petitioner to report to the State of Minnesota 81.55% (its own track mileage proportion) of the earnings paid to said Dock Company as aforesaid, and to compel petitioner to pay thereon the gross earnings tax specified in said statute.

That the docks, storage and grading compartments, classification yards, and other facilities, by which said Dock Company performed its said service, were located entirely in the State of Wisconsin. That the services rendered by said Dock Company, for which its portion of said revenue was collected and received, were rendered entirely in the State of Wisconsin and while said ore was in transit in interstate commerce; that the portion of said Dock Company's service, which consisted of unloading said ore from cars and transferring same to steamships, was a necessary incident to and part of the transportation of said ore in interstate commerce to destinations in other states, and

that the balance of said Dock Company's services consisted of the sorting, mixing and grading of said ore for the purpose of making the same more merchantable upon arrival at its ultimate destination in other states.

In paragraphs 6 and 7 of its amended answer to this proceeding your petitioner set up and alleged that the attempt of the State of Minnesota to levy the tax here in question was in contravention of Section 8 of Article I of the Constitution of the United States and of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the statute as construed by the state would impose a burden upon interstate commerce and would deny to the defendant due process of law and the equal protection of the law.

That in its said decision the Supreme Court of the State of Minnesota construed said statute as levying a tax on petitioner's said track mileage proportion of all revenues collected by petitioner on its own behalf, as well as on behalf of the said Dock Company, not only for the hauling of said ore over the petitioner's line of railway, but for the classifying, sorting, mixing, grading and storage of said ore and for the transfer of same from railway cars to steamships, all of which was done in the State of Wisconsin. That said statute as so construed by the Supreme Court of the State of Minnesota violates Section 8 of Article I of the Constitution of the United States in taxing the proceeds of interstate commerce, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States in taxing property outside of the State of Minnesota, in taxing revenue derived by petitioner from property outside of the State of Minnesota, and in denying to petitioner due process of law and the equal protection of the law, all as more particularly specified in the Assignment of Errors filed herewith.

Wherefore Your petitioner prays for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Minnesota and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may

be examined and corrected and said judgment reversed, and your petitioner discharged.

Dated at St. Paul, Minn., March 26, 1928.

Great Northern Railway Company, Petitioner, by F. G. Dorety, Thomas Palmer, Attorneys for Petitioner.

[fol. 350a] [File endorsement omitted.]

[fol. 351] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

WRIT ON APPEAL

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Great Northern Railway Company, appellant, and State of Minnesota, respondent, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of its validity, a manifest error hath happened to the great damage of the said Great Northern Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the [fols. 352 & 352a] record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have

the same at Washington, D. C., within thirty (30) days from the date hereof, said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right according to the laws and customs of the United States should be done.

Witness The Honorable William Howard Taft, Chief Justcie of the United States, this 26th day of March, in the year of our Lord one thousand nine hundred and twenty-eight.

—— ——, Clerk of the Supreme Court of the United States, by Joel M. Dickey, Clerk of the District Court of the United States for the District of Minnesota. (Seal of the U. S. Dist. Court, Third Division, Dist. of Minnesota.)

Allowed by S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[fol. 353] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Mar. 26, 1928

Now comes the said appellant and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Minnesota in the above entitled matter there was manifest error, in this, to-wit:

First. The said court erred in holding that Section 1669 of the General Statutes of Minnesota for 1894 and Chapter 253 of the General Laws of Minnesota for 1903 are not in conflict with Section 8 of Article I of the Constitution of the United States.

Second. The said court erred in holding that the provisions of said statutes are not in conflict with Section I of

the Fourteenth Amendment to the Constitution of the United States.

Third. The said court erred in construing the said statutes as imposing a tax upon revenues collected by the appellant on behalf of and paid to its subsidiary Wisconsin corporation for services performed by that corporation other than a railroad haul and performed entirely without the State of Minnesota.

Fourth. The said court erred in holding that the said [fol. 354] tax sought to be collected herein and the statute as construed by the court authorizing the same, did not impose an undue and unreasonable burden upon interstate commerce.

Fifth. The said court erred in holding that the said tax sought to be collected herein and the statute as construed by the court authorizing the same, did not deprive appellant of property without due process of law.

Sixth. The said court erred in holding that the said tax sought to be collected herein and the statute as construed by the court authorizing the same, did not deny to appellant the equal protection of the law.

Seventh. The said court erred in denying to appellant the immunity claimed by it, under Section 8 of Article I of, and under Section 1 of the Fourteenth Amendment to, the Constitution of the United States, from the tax sought to be imposed upon it in this section.

Eighth. Said court erred in failing to hold that the said statutes violate the said provisions of the United States Constitution and are, therefore, invalid, and that there is no authority in law for the collection of the tax sought to be imposed by the respondent in this action.

Ninth. The said court erred in holding that said tax sought to be collected herein, is not a tax on property in a state other than Minnesota.

Tenth. The said court erred in holding that "at the trial it was not urged that the so-called gross earnings tax was unconstitutional and no evidence was offered for the purpose of showing it to be so."

Eleventh. The said court erred in holding that "no evidence was offered at the trial upon the relative values of appellant's property in Minnesota and in Wisconsin as compared with mileage in support of a claim of unconstitu- [fol. 355] tionality." And in holding that the evidence of investment in the property in Minnesota and in that in Wisconsin was "apparently upon the theory that it was reasonable to allocate to a subsidiary or an allied or owned company 25 or 22 or 15 cents per ton for the lower end of the haul, or to deduct such sum as a servcie charge." And in holding that "the evidence as to value of specific portions of the ore line is far from satisfactory." And that "neither party considered these matters of anything but incidental or trivial consequence and of no constitutional bearing for there was no constitutional question."

Twelfth. Said court erred in holding that "there was no claim of unconstitutionality either in the trial court or in this court on appeal or on the first motion for reargument."

Thirteenth. Said court erred in holding that appellant took no account of other traffic moving over the line of railroad, the earnings from which are sought to be taxed in this action, and in holding that the said tracks carry traffic other than the iron ore, the earnings from which are sought to be taxed in this case, and in holding that none of such other traffic can reach the docks or depots of appellant at Superior or Duluth without passing over tracks which carry iron ore.

Fourteenth. Said court erred in holding that "there is nothing to tell us * * * what the use value is of trackage employed in common by ore and non-ore traffic, and how it should be apportioned." And in holding that "the evidence gives us no basis for the apportionment of its value according to use by ore and non-ore traffic."

Fifteenth. Said court erred in holding that the ore trackage of appellant could not be considered one road and "if it could be there apparently would be a government recapture."

Sixteenth. Said court erred in holding that in 1912, the ore trackage of appellant "was making over eight million dollars per annum on a 107 mile haul, or earnings of

[fol. 356] $78,000 per mile, all for a six months year, and for a traffic which moved rapidly and easily." And in holding that "if earnings at all comparable were spread over its 2,000 miles of mileage in Minnesota they would be fabulous."

Seventeenth. Said court erred in holding that the road of appellant "has a unitary value which cannot be disregarded because one mile costs for construction more than others."

Eighteenth. Said court erred in holding that "the road which has the privilege of carrying the ore, whether through direct ownership or indirect ownership or control through subsidiaries, or through contracts with mines in which it is not interested, makes the earnings. No other could. Without such ownership or control or contracts ore carrying roads would not have their present value nor make their present great earnings."

F. G. Dorety, Thomas Balmer, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 357] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

ORDER ALLOWING APPEAL—Filed Mar. 26, 1928

The above entitled matter coming on to be heard upon the petition of the appellant therein for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of the State of Minnesota, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that an appeal be and is hereby allowed from this court to the Supreme Court of the United States,

and that the bond presented by said petitioner and filed with its petition be and the same is hereby approved, and further proceedings under the judgment rendered by this court in said action are hereby stayed pending the receipt of mandate herein from the Supreme Court of the United States, and no remittitur shall be made herein to the District Court of Ramsey County pending the receipt of such mandate.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

Dated March 26, 1928.

[File endorsement omitted.]

[fols. 358-359a] Bond on appeal for $700,000, approved and filed March 26, 1928, omitted in printing.

[fol. 360] IN SUPREME COURT OF MINNESOTA

No. 23542

[Title omitted]

STIPULATION FOR APPROVAL OF BOND—Filed Mar. 26, 1928

It is hereby stipulated by and between the above entitled parties, by their respective attorneys, that the bond of the Great Northern Railway Company, as principal, and without sureties, in the penal sum of seven hundred thousand dollars ($700,000), filed with the petition for allowance of appeal herein, may be approved by the above entitled court and may operate as a supersedeas bond in this action, with the same effect as though said bond were executed by duly qualified sureties.

G. A. Youngquist, Attorney General of the State of Minnesota, Patrick J. Ryan, Attorneys for Respondent. F. G. Dorety, Thomas Balmer, Attorneys for Appellant.

Dated March 26, 1928.

[File endorsement omitted.]

[fol. 361-362a] Citation, in usual form, showing service on G. A. Youngquist, filed March 26, 1928, omitted in printing.

[fol. 363] Certificate of Grace Kaercher, Clerk of Supreme Court of Minnesota, to foregoing transcript, omitted in printing.

[fol. 363a] SUPREME COURT OF THE UNITED STATES

No. 107

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed April 9, 1928

Now comes the Great Northern Railway Company, the above named appellant, pursuant to paragraph 9 of Rule 11 of the rules of the above entitled Court, and states that the points upon which it intends to rely in the above entitled proceeding are as follows:

1. That all income sought to be taxed in the above entitled proceeding was derived from operations forming portions of interstate commerce.

2. That all such income was derived from transactions carried on entirely outside the State of Minnesota and beyond the jurisdiction of said state.

3. That the earnings sought to be taxed against appellant in this proceeding were earnings of corporations other than appellant, and were not the earnings of appellant.

4. That the attempted tax upon the proceeds of interstate commerce would impose a burden upon interstate commerce in violation of Section 8 of Article I of the Constitution of the United States.

5. That the attempt to tax property and the income from property located entirely outside the State of Minnesota would result in taking property of the appellant without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fols. 364 & 365] 6. That the attempt to collect a tax from the appellant on the earnings of other corporations would result in denying to appellant the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Appellant designates as the parts of the record which it considers necessary for the consideration of the above points, the entire record in this case as certified and transmitted to the above entitled Court by the Clerk of the Supreme Court of the State of Minnesota.

F. G. Dorety, Thomas Balmer, Attorneys for Appellant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated April 5, 1928.

Service of the foregoing statement and designation upon the State of Minnesota, the appellee therein named, is hereby acknowledged, and a copy of said statement and designation is received this 5th day of April, 1928, in the office of the Attorney General of the State of Minnesota.

G. A. Youngquist, Attorney General of the State of Minnesota, by James E. Markham, Deputy Attorney General.

[File endorsement omitted.]

Endorsed on cover: File No. 33,350. Minnesota Supreme Court. Term No. 106. Great Northern Railway Company, plaintiff in error, v. The State of Minnesota. Filed April 9th, 1928. (33,350.)

Office Supreme Court, U.S.
FILED
NOV 17 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1928.

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No. 106.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

No. 107.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE STATE OF MINNESOTA.

Appeal from the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

F. G. DORETY,
THOMAS BALMER,
Attorneys for Plaintiff in Error and Appellant.

Dated November 14, 1928.

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Supreme Court of the United States

October Term, 1928.

No. 106.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

No. 107.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE STATE OF MINNESOTA.

Appeal from the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

The opinion supporting the judgment under review is reported in 174 Minnesota Reports 3, 218 N. W. 167.

Jurisdiction is asserted here under Section 237 of the Judicial Code, 43 Stat. L. 937, which provides that a final judgment in any suit in the highest court of a state in which a decision in a suit could be had, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.

The opinion in the court below was rendered on March 2, 1928 (R. 224), and judgment in accordance therewith was filed on March 23, 1928 (R. 231). Petition for writ of error was filed on March 26, 1928 (R. 219), and allowed on the same date (R. 215). Notice of appeal and petition for allowance of appeal were also filed on March 26, 1928 (R. 236), and appeal was allowed on the same date (R. 244).

The basis of jurisdiction of this Court lies in the fact that the Supreme Court of Minnesota is the highest Court of that State and that the validity of a statute of the State of Minnesota was drawn in question in this suit in that Court, upon the ground that such statute was repugnant to the Constitution of the United States. This constitutional question was raised by answer (R. 8-11), and by supplementary petition for reargument. The State Court actually considered the constitutional question, and specifically decided it in favor of the validity of the statute assailed (R. 224-231).

Cases which sustain the jurisdiction of this Court under these circumstances are:

San Jose Land and Water Co. v. San Jose Ranch Co., 189 U. S. 177 at 179.

Montana ex rel. Haire v. Rice, 204 U. S. 291 at 299.

Chambers v. B. & O. R. R. Co., 207 U. S. 142 at 148.

Miedreich v. Lauenstein, 232 U. S. 236 at 243.

Mallinckrodt Chemical Works v. State ex rel. St. Louis, 238 U. S. 41 at 49.
Cissna v. Tennessee, 246 U. S. 289 at 293.

Review is being sought in this Court, both by writ of error (Docket No. 106) and by appeal (Docket No. 107). This is because the Act approved January 31, 1928, c. 14, 45 Stat. 54, after abolishing writs of error and substituting appeals, contains a proviso "that the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts". It is not clear to us whether the requirement that review shall be "in the same form" is intended to preserve writs of error for the review of judgments in state courts, or to substitute appeals, using the forms for writs of error, and we accordingly took both forms of procedure. We assume that the court will dismiss one proceeding or the other, whichever may be held to be improper. The Act approved April 26, 1928, c. 440, 45 Stat. 466, makes it clear that an appeal and not a writ of error is the proper remedy under that Act, but these proceedings had been initiated before the latter statute was passed.

A former judgment in this same action was before this Court upon writ of error in Docket No. 124 of the October term 1926, and was dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of the claim of a substantial Federal Constitutional question in the Court below. 273 U. S. 658. Following the dismissal of said writ of error, the judgment, of which a review had thus been denied, was vacated by the Supreme Court of the State of Minnesota (R. 223), and thereafter that Court entertained a petition for reargument of the Federal Constitutional questions and later still entered the judgment which is here under review, and in which that Court

did in fact decide the Federal Constitutional questions involved, in favor of the validity of the State statute (R. 224). Both the appeal and writ of error which are now before this Court are from the latter judgment.

The action was brought by the State to collect a tax of over half a million dollars levied under the Minnesota Gross Earnings Tax Statute, which levied a tax of 4% (formerly 3%) on intrastate earnings of railways in Minnesota and on Minnesota's mileage proportion of all items of interstate earnings. The defendant had published a single charge for an entire service consisting of hauling iron ore from the mines in Minnesota to the Lake docks in Wisconsin, mixing, grading and storing the ore upon these docks in Wisconsin, and loading it upon steamships. The dock was owned and the dock service was performed by a subsidiary Dock Company, under a contract whereby approximately one-fourth of the total charge was paid by the Railway to the Dock Company for its service, the balance being retained by the Railway Company as compensation for the rail haul. About 81% of the rail haul mileage was in Minnesota and accordingly the Railway Company paid the Minnesota Gross Earnings tax upon 81% of the rail haul compensation retained by it, but did not pay any Minnesota tax upon that part of the total charge which was paid to the Dock Company for its services in Wisconsin. This action was brought to compel the Railway Company to pay the Minnesota tax upon 81% of the money thus paid to the Wisconsin Dock Company.

It was alleged in paragraphs VI and VII of the amended answer, particularly in the last half of paragraph VII (R. 10-11) and shown in the evidence, that the Minnesota mileage proportion of the said property was very much in excess of the value proportion, and that a mileage prorate to Minnesota of the total earnings would subject property out-

side of the State to taxation within the State, and would unreasonably tax proceeds of interstate commerce, and would render the said laws invalid and in contravention of Section 8 of Article 1 of the Constitution of the United States and of Article 14 of the amendments thereof. In spite of this answer, and evidence offered in support thereof, the lower Court entered judgment in favor of the State (R. 211). The Railroad Company appealed to the Supreme Court of the State of Minnesota, which, after vacating an earlier judgment, finally, affirmed the judgment of the lower Court (R. 224). This writ and appeal run to the last judgment of the Supreme Court of the State.

STATEMENT OF THE CASE.

The statutes under attack are the following laws of Minnesota:

Laws of 1873, Chapter 111.

Laws of 1887, Chapter 11 (Revised Statutes of 1894, Section 1669).

Laws of 1889, Chapter 235.

Laws of 1903, Chapter 253.

The greater part of the tax is assessed under the last named statute, which covered the years 1905 to 1912, inclusive, and is similar in terms to the earlier statutes, except that it changed the tax from three per cent to four per cent, so that it seems sufficient to quote only from chapter 253 of the laws of 1903, which read as follows:

> "1. Every railroad company owning or operating any line of railway situated within or partly within this State, shall during the year 1905 and annually thereafter, pay into the treasury of this State, in lieu of all taxes and assessments upon all property within this State owned or operated for railway purposes by such company, including equipment, apparatus, appendages and franchises thereof,

a sum of money equal to 4 per cent of the gross earnings derived from the operation of such line of railway within this State; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. * * *"

"2. The term 'the gross earnings derived from the operation of such line of railway within this State', as used in Section 1 of this Act, is hereby declared and shall be construed to mean all earnings on business beginning and ending within the State, and a proportion, based upon the proportion of the mileage within the State to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the State."

Under the Minnesota Statute, each separate item of interstate revenue on each separate shipment is allocated to Minnesota in proportion to the mileage of that particular shipment. While 26% of all Great Northern mileage is in Minnesota, this does not mean that 26% of all Great Northern interstate revenue is allocated to Minnesota. On the contrary the allocation may include 10% of the revenue on one shipment, 50% on another and 90% on a third, depending on what proportion of the mileage of each particular shipment is in Minnesota. It is the sum of these separate allocations that constitutes the total amount on which the tax is computed.

We are not attacking the validity of these statutes as applied to interstate *rail line* earnings of the railroads. This Court has held that similar statutes are constitutional as applied to line haul earnings. What we are contending is that there would be a violation of the Federal Constitution in applying such a statute to the Wisconsin dock revenue involved in this case.

The facts appearing in the record are as follows. During the years 1901 to 1912, inclusive, the plaintiff in error and

appellant owned or controlled through subsidiaries, and operated a line of railroad approximately one hundred seven miles in length, extending from the Mesabi Iron Range, in Minnesota, and reaching docks upon the shore of Lake Superior, at Allouez, Wisconsin (R. 49). The docks and about twenty miles of the railroad were located in Wisconsin (R. 14). The balance, which was 81.55% of the entire track was located in Minnesota (R. 2, 6). The docks, and the tracks immediately connected therewith, were owned and operated by a subsidiary corporation, which will hereinafter be referred to as the Dock Company, the entire stock of which was, until 1906, owned or controlled by the plaintiff in error (R. 14, 15). In 1906, the iron ore properties of the Great Northern Railway Company, together with stock in certain subsidiary companies, including the Dock Company, were transferred to the Trustees of the Great Northern Iron Ore Properties, to be held in trust for the persons who were shareholders of the Great Northern Railway on December 7, 1906 (R. 122-126). From that time on, there was a divergence in the beneficial ownership of the stock of the Great Northern Railway Company, and the stock of the Dock Company, and the control of the Dock Company was independent of that of the Railway Company (R. 123).

When the ore trains reached Lake Superior at Allouez, the cars were turned over to the Dock Company, which performed certain services in switching, classifying and storing the cars, in transferring them to the docks and unloading the ore into storage pockets, and in mixing, grading, sorting and storing the ore and later loading it into steamers (R. 17, 39-42).

The total charge paid by the shipper for the entire service from the mine to and through the dock and into the steamer varied from 80¢ to 60¢ per ton at different times (Exhibits E-I, inclusive, R. 146-150). The Railway Company and the Dock

Company had entered into contracts whereby the Dock Company was to receive a portion of this total charge varying at different times from 25¢ to 15¢ per ton for its portion of the service (R. 66-67). Up to 1906 when the publication of tariffs was first required by statute, there was no published tariff covering this service, the amount of the charge being merely a matter of common knowledge among the shippers (R. 28, 68). After 1906, the charge was covered by printed tariffs issued in the name of the Railway Company, but providing that the published charge should include dock service (Exhibits E-I, R. 27, 146-150). At all times, both before and after the publication of the tariffs, the Railway Company collected the entire charge from the shipper and paid the Dock Company its proportion. It is a common practice for one connecting railway company to collect an entire through charge, later remitting to other connections their proper proportions (R. 67).

In reporting its revenue to the State of Minnesota for taxation, the Railroad Company first deducted from the total charge thus collected, the amount paid to the Dock Company, and reported the balance as rail haul earnings, allocating the mileage prorate of such balance, or 81.55% to Minnesota, and paying a 4 per cent tax thereon during the years 1905 to 1912, inclusive. The tax was 3 per cent in 1901 to 1904, inclusive. This is all admitted in the pleadings (R. 2-3, 6). In 1913 the State tax officials concluded that the entire charge collected from the shippers, including the amounts paid to the Dock Company, as well as the amounts retained by the Railway Company, should have been prorated to the State of Minnesota in proportion to the track mileage, and demanded that the Railroad Company pay the State a tax upon the track mileage proportion of the amounts paid to the Dock Company. The dock revenue thus sought to be taxed, amounted to over $16,000,000, and the tax

claimed amounted to $510,859.22, in addition to penalties and interest (R. 4-5). The Railway Company refused to pay this additional tax and this suit was brought to enforce the same.

While the stock of the Dock Company was owned or controlled by the Great Northern Railway Company until 1906, and while the two companies had certain executive officers in common, the actual operation of the dock was under the charge of a superintendent who was an exclusive employe of the Dock Company, and who had entire charge of the dock, its employes and operation. The Dock Company kept a full set of accounts, made its own reports to all public authorities, carried its own payrolls, purchased its own materials, and handled its own funds (R. 25, 29, 34, 44-45, 47-48, 71, 90). It made its own returns under the Federal Capital Stock Law which includes its earnings from the operation of this dock and paid its own Federal Capital Stock tax thereon (R. 47). It was ready to handle ore tendered to it by other companies and did in fact handle a small amount for another company (R. 78-79, 116). It did not have its name appear on the tariffs for the reason that until a decision of the United States Supreme Court in 1911 or 1912, holding to the contrary, it believed that it was not subject to the provisions of the Interstate Commerce Act (R. 124).

When the total charge was 80 cents, and when the amount paid to the Dock Company was 25 cents, the Railroad Company deducted the 25 cents from the 80 cents, leaving 55 cents as rail haul earnings, and prorated eighty-one and fifty-five hundredths (81.55) per cent of this 55 cents (being the track mileage proportion) to Minnesota, and paid the tax thereon. The reasonableness of the amount apportioned to the Dock Company, or set aside for dock service, is not questioned. There is no evidence in the record, and the State did not attempt to

show, that the charge paid to the Dock Company was out of proportion to the service rendered by it or to the amount of property used by it.

While 81.55 per cent of the track miles were in Minnesota, only about 60 per cent of the investment was in Minnesota. In 1911, for example, the investments were as follows: (R. 60-62, 97, 98, 100)

Total Wisconsin (dock and 20 miles of railway)	$7,029,926
Dock	5,398,476
20 Miles of Railway (in Wisconsin)	$1,631,450
Track in Minnesota	10,739,828
Track Both States (106 miles)	$12,371,278
Track Investment per Mile	$116,710

It will be noted from the above that although 81.55 per cent of the track miles were in Minnesota, only 60.4 per cent of the total investment was in that State, and that the one mile of dock property in Wisconsin was worth forty-six times as much as an average single mile of track in Minnesota.

Similar total investment figures as of each of the years 1908 to 1912, inclusive, are contained in the record (R. 60-62).

There were four (4) docks in all. They were elaborate structures nearly a mile long, and rising 75 feet above the water (R. 38-39). Every dock had six (6) railroad tracks upon it, and had inclined approach tracks up which the cars were run from the ground level. Three (3) of the docks were of timber construction and one of steel and concrete. Every dock contained from 100 to 250 bins or pockets into which ore was dumped from the cars. Upon the docks were some eight (8) different buildings including offices of the Agent and Superintendent, interlocking plant, telegraph office, and heating house for thawing the ore in cold weather (R. 38-39).

Connected with the docks were inbound and outbound yards containing 23 tracks, each from 3,400 to 3,876 feet in length, and two classification yards containing 15 or 16 tracks each, making about 53 yard tracks in all, or 53 times as much track per mile as any mile of single track railroad (R. 115-116). Connected with these yards were the buildings necessary for a railroad terminal, consisting of a roundhouse, storehouse, oil and sandhouse, water tanks, scales, cinder pits, turntables, etc. (R. 116). These yards and terminal facilities were all owned and operated in the name of the Dock Company, and use of them was included in its charge (R. 47).

The amount of service performed by the Dock Company was far more elaborate and costly, in proportion to its single mile of property, than was the service performed on any mile of track in Minnesota, so that the proportion of the total service, which was performed in Minnesota was very much less than the proportion of mileage in Minnesota. Moreover, the service of the Dock Company was largely in the nature of a treating process, entirely distinct from transportation, and not related to track mileage in any way.

The ore coming from the mines was of varying mineral content. It was necessary, in marketing it, to sort out the different grades of ore, and to mix lower grade ore with higher grades, in order to produce a mixture for commercial use. This sorting, grading and mixing process was performed by the Dock Company (R. 49-50). The ore came from about a hundred different mines and had to be graded and sorted into about a hundred different grades (R. 49). The first step in this process consisted in running cars into the classification yard and sorting them according to grade of ore, before running them upon the dock, and involved considerable switching service (R. 50). When the cars reached the dock, different cars had to

be unloaded in the same pockets, or different pockets, in order to get the right mixture, and it was frequently necessary to store ore in partially filled pockets or upon cars for a considerable period of time awaiting the arrival of further ore of a proper grade for purposes of mixture (R. 41-42, 51). Each pocket was provided with a spout which could be raised or lowered by machinery for the purpose of loading the ore from the pocket into the vessel (R. 39).

During cold weather the ore usually had to be thawed out by steam before it could be unloaded from the cars into the pockets or run from the pockets into the steamer. The Dock Company provided the steam plant and thawing apparatus for this purpose. This was an expensive process (R. 51, 81-83). Whether the ore had been frozen or not, it was frequently wet and sticky, and a special force of men was employed with long poles for the purpose of prodding the wet ore out of the cars and causing it to slide into the pockets and later in prodding it out of the pockets into the steamer (R. 41).

When the total charge was 80 cents, and 25 cents was paid to the Dock Company, the remaining 55 cents covered 106 miles of rail haul or approximately .51 cents a mile for the rail haul, so that the charge of 25 cents for the single mile of dock service was nearly fifty times as great as the charge for a single mile of rail haul. The State offered no evidence that this division of the total charge was unreasonable or disproportionate to the service.

This ore line as measured by its gross revenue and by the character of its business was an easily severable and very substantial part of the entire railway system of plaintiff in error, and had been constructed, and operated for some time, by a separate railroad company (R. 17). The revenues of the Dock Company for 1912 as shown by Exhibit A attached to the com-

plaint were $2,087,520.46 (R. 5). As the Dock Company received only about one-fourth of the total revenue paid by the shipper including the line haul and dock service, the total revenue from ore service for that year must have been approximately four times the dock revenue or about $8,350,000. According to the annual report of the Interstate Commerce Commission for 1912, there were then 169 Class I railways in the United States and only 72 of them or 42% earned over eight million dollars. In other words, the ore line and the dock company if separately owned, or considered as separate property, would have been among the larger 42% of the Class I railways of the United States measured by gross revenue.

Moreover, the total revenue from ore service which Minnesota is attempting to allocate to herself is approximately one-fourth of all the revenue of the Great Northern Railway system from all sources which is allocated to Minnesota. We have seen in the last paragraph that the total revenue from ore service in 1912 was approximately $8,350,000. 81.5 per cent of this, which the State claims as Minnesota revenue, amounts to $6,805,250, and a four per cent tax on it would amount to $272,210. The total tax paid by the Great Northern Railway Company to Minnesota on revenue from all sources in 1912 was $1,165,021.29. (Amended answer, paragraph 6, amended reply, paragraph 2, R. 8, 12). This is approximately four times the amount just computed as the Minnesota tax on revenue from ore service only. A very substantial portion of the entire tax paid is assessed against revenue which is wholly intrastate. If this were deducted from the total tax paid, the remainder, which would be the tax assessed against mileage prorates of interstate revenues, would be a much smaller sum and would be much less than four times the tax assessed against ore revenues. It follows that the ore lines and docks,

and the ore traffic, which are covered by the investment figures and other evidence in this case, constitute a very substantial proportion of the entire system, and of all the traffic which the Great Northern Railway system handles across the boundaries of Minnesota.

It has not been customary to apply the mileage prorate provided for by the Minnesota Statute to separate charges made for terminal services. Where shipments of commercial freight are hauled into Minnesota terminals from points outside the State, a separate charge is assessed in Minnesota for some terminal services, such as switching, storage and demurrage (R. 57-58, 65, 125). It has been customary to report 100 per cent of the earnings from such terminal service as Minnesota earnings, and not to apply the mileage prorate. The same rule applies to charges for storage of freight and baggage, and some elevation charges (R. 57-58). The mileage prorate is not applied to such revenue, even though earned in connection with interstate shipments.

During the years in question, ad valorem taxes were paid in Wisconsin upon the property of the Dock Company, as well as upon that portion of the trackage located in Wisconsin (R. 126).

The assigned errors, which will be urged in this brief, are all of the errors assigned on pages 241 to 244 inclusive of the printed transcript, and all go to the point that the Court erred in holding that the statutes in question, as construed by the Supreme Court of Minnesota, are not in conflict with Section 8 of Article 1 of the United States Constitution, and with Section 1 of the 14th Amendment, and in holding that the statutes, as construed by the Court, did not impose an undue and unreasonable burden upon interstate commerce; did not deprive plaintiff in error of property without due process of law, and

did not withhold from plaintiff in error the equal protection of the law; and that the Court erred in denying to plaintiff in error the immunity claimed by it under the aforesaid portions of the Constitution from the tax sought to be imposed in this action.

SUMMARY OF ARGUMENT.

The statute, as construed to apply to the earnings in question here, is unconstitutional because it assesses against the defendant, a Minnesota railway corporation, a tax upon earnings of a Wisconsin dock company separately incorporated.

Even if the Dock Company be regarded as an agency of the defendant Railway Company, the statute, if construed as applying a mileage prorate to the entire earnings from ore service, is unconstitutional; first, because the value of the dock property in Wisconsin, which contributes to the earnings, is approximately fifty times as valuable per mile as the average mile of track in Minnesota; second, because the services performed in and about the dock and yards in Wisconsin are many times more elaborate and costly per mile than the service performed on an average mile of track in Minnesota; third, because the portion of the charge applied by the defendant to the single mile of dock service in Wisconsin was approximately fifty times as great per mile as the charge for an average mile of rail service in Minnesota; and fourth, because a portion of the earnings is fairly attributable to an ore treating and storage process in Wisconsin which was not a part of nor incident to transportation and not related to track mileage, and, therefore, not subject either to mileage prorate nor to any other apportionment to Minnesota.

The *method of assessment* being one that tends to tax earnings and property in Wisconsin, the resulting tax necessarily violates the Federal Constitution.

It is not necessary to consider whether there are any equally valuable terminals in Minnesota on other lines of the defendant handling general traffic, or whether there is any off-setting under-assessment by Minnesota on defendants earnings from general traffic. The state has offered no evidence of such an off-set, and an under-assessment in Minnesota would be no defense against an over-assessment on other property, particularly when located in Wisconsin.

The investment in the Twin City terminals in Minnesota cannot be compared with or offset against the value of the Wisconsin ore docks. The Twin City terminals forward and receive freight to and from hundreds of stations in many different states. They are used by a much larger number of shipments than are any country terminals in other states, and the correspondingly larger number of items of taxable revenue, tends to produce a total tax for Minnesota more than adequate in proportion to investment. Moreover, this terminal investment must be spread over and charged against all of the large number of shipments using the terminal, so that the amount of investment per mile fairly chargeable against each individual shipment in Minnesota, may be smaller than in other states. The costly mountain construction in the West, with relatively lighter traffic density, produces an investment per mile chargeable against each individual shipment in other states, offsetting that in Minnesota.

The Wisconsin docks are used exclusively for ore, and the total investment is chargeable 100% against the ore traffic. This traffic originates entirely on a limited number of mine spurs in Minnesota, and the total investment in these spurs has been

credited to Minnesota in comparing her investment in ore facilities with that of Wisconsin.

The ore line is in effect a separate railroad. Its revenue constitutes 25% of the Great Northern interstate revenue taxable by Minnesota. Its earnings are in part attributable to a treating process which is not an incident of transportation. For these reasons, we are entitled to relief in this case, notwithstanding the fact that our attack upon the mileage prorate is confined to the ore line alone.

ARGUMENT.

The fact that the earnings sought to be taxed here were earnings of a dock company incorporated in Wisconsin and doing business solely in Wisconsin, as well as the fact that they were derived from interstate commerce, would seem to be good and sufficient reason why they should not be taxable against a railway company in Minnesota. This objection was overruled by the State Court upon the ground that the stock of the Dock Company was owned by the Great Northern Railway Company, that part of the executive officers were the same, and that the ore service included both rail haul and dock handling as a unit, each function being necessary to and dependent upon the other,—in short that the Dock Company was a tool or instrumentality by which the Railway Company discharged a part of a single service to the shipper, and that, therefore, the revenues of the Dock Company were really railway revenues.

The undisputed evidence shows that the Dock Company was a separate corporation keeping separate accounts and funds, making separate reports, and having an independent operating organization which directed its functions, and that after 1906,

its ownership was independent of the Railway Company. The facts are undisputed. The conclusion of the State Court that these facts made it permissible for Minnesota to tax the Great Northern Railway Company for earnings of the Dock Company, is a conclusion of law involving a constitutional question. We believe that it is within the province of this Court to re-examine that conclusion, and that a reversal of the judgment is required upon the ground that, when the undisputed facts show an assessment against one person or corporation on the earnings of another outside the state, such assessment necessarily violates the Federal Constitution.

However, for the purpose of further argument, we will temporarily assume the correctness of the conclusion of the State Court on this point. We may even assume for this purpose that there was no separate Dock Company, but that the Great Northern Railway Company owned and operated the dock property in its own name and in conjunction with its rail lines. Even with these assumptions granted, we are still confronted with facts which make the attempted tax unconstitutional in this case.

We recognize that while earnings from interstate commerce are not per se taxable by a state, either as a whole or in any proportion, nevertheless the property that produces them and which is located in a state is taxable in that state; and the earnings of that property both from intrastate and interstate commerce may be treated as a measure of the value of the property and may, therefore, be taxed directly, in lieu of a property tax, *so long as the earnings that are taxed are earnings that are fairly attributable to the property that is located within the state.*

In valuing the property located in the State for the purpose of assessing an ad valorem tax upon it, it is ordinarily proper

to value an entire interstate line, and to prorate such value to the State on a mileage basis, it being presumed, in the absence of evidence to the contrary, that the values per mile are approximately uniform. Similarly, where the tax is against, or is measured by the earnings of that portion of an interstate railway located in a single state, a total interstate charge may be apportioned to the State on a mileage prorate, it being presumed that the earnings of the entire line per mile are approximately equal.

The rules just stated are based upon the fact that there is ordinarily a close relationship between the amount of a railroad charge and the length of the haul. In other words, there is ordinarily a relationship between mileage and earnings. The longer the haul, the greater will be the charge. And the keystone of this doctrine is the presumption that, in the absence of evidence to the contrary, the value of each mile of railroad is approximately equal, and that an approximately equal proportion of every total charge is fairly attributable to each mile of haul. If the service rendered is something other than transportation, so that there is no logical relationship between amount of charge and track miles, or if it affirmatively appears that the physical values per mile are not equal, or that the proportion of earnings fairly attributable to each mile is not equal, there can be no room for the application of this doctrine.

Under the facts appearing in this record the doctrine above stated is not applicable in this case. The first of these facts is that the value per mile of the railroad in question is not uniform, but is much higher outside the State than inside. The record shows a total investment in 1912 of $17,849,774 in the tracks located in both Minnesota and Wisconsin and in the docks in Wisconsin. As 81.55% of the mileage was in Minnesota, a mileage prorate would give Minnesota $14,554,490.69

of this investment, whereas the actual investment in Minnesota was only $10,879,591 (R. 61). To allocate 81.55% of the entire investment to Minnesota would, therefore, give Minnesota an excess of nearly four million dollars. Although 81.55% of the track miles were in Minnesota, only 60.4% of the total investment was in that State, and one mile of dock property in Wisconsin was worth forty-six times as much as an average single mile of track in Minnesota.

The above figures were for 1912. Similar investment figures as to each of the years 1908 to 1912, inclusive, are contained in the record and show similar relationships. Investment figures for years prior to 1908 were not given, but the judgment under attack includes every portion of the entire tax for every year, and clearly, if it was unconstitutional for any one year, the entire judgment must be reversed.

In addition to showing this inequality of investment, the record also shows an overwhelming preponderance of physical units and physical structures on the single mile of dock property in Wisconsin, as compared with an average mile of track in Minnesota. The dock yards alone which were nearly a mile long contain 53 parallel tracks, and, therefore, 53 times as many rails and ties as a mile of single track in Minnesota, in addition to switches and other yard facilities. The docks consisted of four separate structures, one of them all steel and concrete. They were a mile long and rose 75 feet above the water, and each one supported six parallel tracks or 24 in all. It is obvious from these facts, even if there were no investment figures in the record, that such a line cannot have anything like a uniform value per mile.

In addition to this excess value per mile of the physical property in Wisconsin, the record shows that the portion of the total charge fairly attributable to the single mile of dock prop-

erty in Wisconsin is much greater than that attributable to any single mile of track in Minnesota. This is so partly because the value of the plant which produces the earnings is so much greater per mile outside the State than inside, and partly because the amount of service furnished and the operating expenses incurred in producing it were much greater outside the State than inside. The record does not show the actual operating expense per mile in Minnesota, but it is common knowledge that a train and engine crew of five or six men could haul 100 cars of ore over a single mile of track in three or four minutes. Assuming a total wage cost of $50 a day or $6 an hour, the cost for this three or four minutes could not have been over thirty or forty cents for handling 100 cars one mile, and even if something were added for fuel, the actual out-of-pocket cost per car must have been only a fraction of a cent per mile in Minnesota. While there were no exact figures in the record on this, it is apparent from common knowledge that the cost per car per mile must be a very small amount.

On the other hand, when the ore reached the dock property, it still had to be transported one mile through the yards and along the dock, but in addition it received a large amount of other service. The record shows that cars had to be sorted in a classification yard in order to sort out, from the cars on hand, certain cars containing certain grades of ore. Taking a few cars from a long string of cars on a certain track one day, and a few other cars on other days, would mean moving the entire string each time so that the same car might be switched in and out of the track many times before being unloaded. Necessarily, a switch crew must handle fewer cars than a train crew and handle the same car more often. The switching required more than fifty tracks where the line haul transportation required only one. After the car was finally ordered to a

dock, a special gang of men was frequently required to prod the ore out of the car into the dock pockets, and out of the dock pockets into the steamer, with long poles, and when frozen, the ore had to be thawed out by steam. While there is no exact comparison in the record, the evidence makes it clear that the cost of switching and unloading a car by the Dock Company must have been many times that of transporting it over a mile of line haul in Minnesota.

A further reason why a larger portion of the charge is fairly attributable to the dock service than to a mile of line haul service, is that the dock service required the use of equipment and property for a very much longer space of time. The transportation of a carload of ore one mile in Minnesota required the use of a car for three or four minutes, and the use of an engine three or four minutes for a whole trainload of cars. For the dock service, the use of the car was required from several hours to several days. It required a correspondingly increased amount of engine service for switching, and the ore sometimes occupied a pocket in the dock for several days or weeks.

The total charge for the entire ore service from mine to steamer must be sufficient to pay all of the operating expenses of both the line haul and the dock service, and a return on the entire investment for the entire period of use. Included in the total charge, therefore, there must have been a comparatively small amount per mile for each of these factors in Minnesota, plus a comparatively large amount for each of these factors involved in the dock service in Wisconsin. The great value of the dock property, the comparatively long period of time during which both the dock property and the equipment were in use by each single ton or single carload of ore, and the comparatively large amount of labor involved in the dock service,

all compel the conclusion that out of the total charge collected, a much larger portion must have been fairly and properly attributable to the single mile of dock property in Wisconsin, than to any mile of the railway in Minnesota. This would necessarily have been true, even if the carrier had not made any actual division of the charge on its own books as between dock service and rail service.

In this case, however, the carrier had made such a division. Even if the separate identity of the Dock Company be ignored, and even if the contract between the Dock Company and the Railway Company for division of the charge be not regarded as a contract between separate entities, but regarded merely as a uni-lateral declaration by the Great Northern Railway Company, it is at least effective as a written record of the division of the charge made by the Great Northern Railway Company upon its own books. Under this contract, from one-fourth to one-third of the total through charge was set aside as compensation for dock service. During a part of the time the Dock Company was receiving 25¢ for its single mile of service, while the Railway Company retained 55¢ for 106 miles of service, or approximately ½¢ per mile for rail haul as compared with 25¢ for a single mile of dock service. The portion of the charge thus set aside for dock service was nearly fifty times as great per mile as the charge set aside for a single mile of rail haul.

The State did not offer any evidence whatever to show that this division of the entire charge was unfair or unreasonable. We believe that it is controlling until shown to be unreasonable. But assuming that it is not controlling, we are still confronted with the inescapable fact that in view of the amount of investment, duration of use of plant and amount of service involved, a very much larger portion of the total charge is fairly and properly attributable to the single mile of dock service, than to any mile of service in Minnesota.

Based on the foregoing facts, the decisions of this Court seem to make it very clear that the tax in question here cannot be sustained.

In the case of an ad valorem property tax, the State cannot appraise the entire value of an interstate line and tax a mileage prorate of such entire value, where it clearly appears from the evidence that the values per mile are not uniform but are substantially higher outside the State than inside. Such a tax is valid only to the extent that the system value can be shown to be fairly uniform throughout its length, so that a mileage apportionment fairly represents a value apportionment. *Pittsburgh, etc. Railway Company v. Backus,* 154 U. S. 421. At page 431 of the case last cited, the Court, while sustaining a mileage prorate, recognized that there would be an exception where valuable terminal property is shown to exist outside the State, so that a mileage prorate would not fairly reflect a value prorate. In such a case, some proper deduction must be made from the total value, in order to allow for such excess outside the State, before the mileage prorate is applied.

A mileage prorate of system value was held unconstitutional in *Fargo v. Hart,* 193 U. S. 490, where the system value which was prorated included securities held by a company outside the State, and where no deduction on this account was made before applying the mileage prorate. At page 500, the Court said:

> "But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In *Wallace v. Hines,* 253 U. S. 66, a special excise tax of fifty cents per thousand dollars invested in the state was held

invalid where the statute provided for a mileage prorate of the entire system investment, and where the system investment included valuable terminals outside the State for which no deduction was made. It is clear from the foregoing decisions, especially Wallace v. Hines, that where physical values per mile are unequal, there cannot properly be an appraisal of the physical value of the entire line and a mileage prorate of such value to a single state, without first making some reasonable deduction for the excess values outside the state.

And where the entire value of an interstate line is determined, not by an appraisal of the physical property, but by capitalizing its entire earnings, a mileage prorate of such interstate value to a single state is improper, where the evidence shows that the earnings per mile outside the state are substantially higher than the earnings per mile inside the state. In *Southern Railway v. Kentucky*, 274 U. S. 76, the franchise or intangible value of the Southern Railway system was determined by capitalizing the earnings of the entire system, and was then prorated to Kentucky on a mileage basis, the value of the intangible property which was otherwise assessed being deducted. The Kentucky tax was condemned by this Court in the case cited, not because the physical value per mile was higher outside the State, but because the earnings of the system per mile were shown to be very much greater outside the State than inside. It thus appears that a mileage prorate of a physical value appraisal is bad where there is an excess physical value per mile outside the State, and likewise a mileage prorate of a capitalization value is bad where there is an excess of earnings per mile outside the State, and where no proper deduction has first been made.

It is clear from these decisions that earnings fairly computed are a proper measure of value for purposes of taxation.

Capitalizing the total interstate earnings of the ore line, including docks, would be a proper method of determining the total value of the interstate line. But no total value of the ore line thus determined could properly be prorated to Minnesota on a mileage basis, because of the excess physical value per mile in Wisconsin. And obviously it makes no difference whether we first capitalize the total earnings and then apply the mileage prorate to determine a property valuation for Minnesota or whether we reverse this order, first applying the mileage prorate to the total earnings and then capitalize Minnesota's proportion of the earnings. The result would be mathematically the same, whether the mileage prorate is applied first to the total earnings, or whether it is applied to the total value derived by first capitalizing total earnings.

It is true that under her statute, Minnesota does not levy a property tax, and, therefore, it is not necessary for her to capitalize either the total earnings, or her mileage prorate of them. Instead she lays a direct tax upon her share of the earnings, without any capitalization or other determination of value.

But earnings from interstate commerce are not taxable per se by a state. Such a tax is sustainable only insofar as it can be regarded as a tax on property. State statutes which purport to impose taxes upon gross earnings of corporations derived partly or wholly from interstate commerce, have repeatedly been held unconstitutional as a burden on interstate commerce. *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania,* 122 U. S. 326, overruling *State Freight Tax,* 15 Wall. 232, which had previously upheld a tax on gross earnings of a railway derived from interstate commerce. Affirmed as to railroad gross earnings tax in *Galveston, Harrisburg, etc. Ry. Co. v. Texas,* 210 U. S. 217 at 224.

The Minnesota gross earnings tax statute and other similar statutes have been sustained only because they purported to be and were treated, not as gross earnings taxes, but as property taxes. The language of these cases makes it clear that the Courts always look askance at these and other statutes imposing taxes upon earnings of interstate carriers, and have sustained them only upon the theory and only to the extent that the earnings could fairly be regarded as an indication of the value of the property, and the tax as a tax upon the property and not upon the earnings. *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *United States Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; *Pullman Co. v. Richardson*, 261 U. S. 330.

It follows from these decisions that, in taxing directly her share of the earnings, Minnesota is using the earnings as a measure of the property value, just as truly as though she were capitalizing them and levying a property tax. It is only because this is so that the tax can be defended at all, since a tax upon interstate earnings per se is invalid. *Galveston, Harrisburg & San Antonio Railway Co. v. Texas*, 210 U. S. 217, is one of the cases in which this Court condemned a tax on railroad gross earnings. On page 226, the Court distinguished the case of *Maine v. Grand Trunk Railway*, 142 U. S. 217, in which a gross earnings tax had been sustained by saying that in the Maine case, "the estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile". There could hardly be a more apt statement of the point that we are making.

But, as we have seen above, Minnesta could not properly capitalize the entire ore earnings and prorate the total value thus obtained on a mileage basis, nor could she first prorate the total earnings on a mileage basis and then capitalize her pro-

portion, as the basis for a property tax. And since in this case she is using the earnings as a measure of property value, just as truly as though she were capitalizing them, it follows that she cannot properly determine her fair share of the earnings to be taxed by prorating the entire earnings upon a mileage basis. By so doing, she is taxing property in Wisconsin just as effectively as though she were prorating a system physical value.

That the constitutional difficulty is not avoided by avoiding a determination of property value and levying a tax directly upon a mileage prorate of the earnings, is established by the decision in *Oklahoma v. Wells Fargo*, 223 U. S. 298. In that case, the prorate was made in proportion to business done within the State instead of in proportion to the mileage, but the principle is the same. The total gross revenue of an interstate express company was prorated in proportion to business done, and a tax was levied upon Oklahoma's proportion. The Court held, however, that this was improper where there was included in the total gross revenue, receipts from sources entirely outside the State. The Court held that such receipts from outside sources could not properly be prorated to the State upon any basis. In approving Fargo v. Hart, the Court said:

> "In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. *The same principle would apply to a property tax measuring the total property by the total gross receipts* increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside." (Italics ours.)

This decision coupled with the decisions above cited make it clear that any prorate, whether of a system physical value, a system earnings value, or of system earnings themselves, is unconstitutional, whether the prorate is based upon mileage or upon the proportion of business done, when there is included in the system value or in the system earnings, excess property values outside the State or excess earnings fairly attributable to sources outside the State. Some reasonable deduction must be made from the total, before any prorate can be sustained in such a case. Under the statute in question, Minnesota is using earnings properly attributable to Wisconsin as a measure of property values in Minnesota. She is levying a tax upon Wisconsin property just as truly as if she were prorating the entire physical value of the line, including the docks, on a mileage basis.

We have been discussing the case so far as though the entire service in Wisconsin were a line haul transportation service, differing from that in Minnesota only in the greater value of the property used, in the greater effort expended, and in the greater charge collected for it. Much of the argument which we have been making would apply if the interstate haul included only a mile or two outside the state, and if that outside mile or two consisted of a five million dollar tunnel, or a five million dollar bridge for which a special toll was computed and included in the total charge. Under such facts, the entire service would be a line haul transportation service, but under the decisions above cited, the application of the mileage prorate would be unconstitutional because of the inequality of the value per mile and earnings per mile. In the present case, however, we have the additional facts that the service performed on the dock property in Wisconsin is terminal and not line haul; that in part at least it is not a transportation service at all, either

terminal or line haul, but a manufacturing or processing service having no relation to mileage; and that there is, therefore, no relationship between track mileage, and that portion of the charge attributable to this dock service.

If this particular ore had moved to Seattle, for export to Asia, instead of moving to Lake Superior, and if the same dock revenue had been collected at Seattle, Minnesota's mileage prorate would be much smaller and she would now be claiming only about ten or fifteen per cent of the revenue thus collected, instead of 81%. And yet, the value of the trackage in Minnesota, the amount of service performed in Minnesota, and the amount of revenue actually earned in that State might all be the same as in the present case. This shows that there is no logical relationship between charges for dock service, and track mileage.

If the Dock Company in this case had been an entirely independent company, receiving as its division of the entire charge, the same amount paid to our Dock Company, there would be no contention that the Great Northern Railway Company could be taxed for any portion of its earnings. And yet here again the value of the Great Northern trackage in Minnesota, the amount of service performed, and the amount of revenue actually earned in that State would all be the same. It seems obvious that the amount of tax which the Great Northern should pay in Minnesota cannot fairly be made to depend on whether a dock located in Wisconsin is owned by the Great Northern or by an independent company.

It might well be that of two competing railroads handling ore traffic and having similar mileage and similar volume of traffic in Minnesota, one might own its own dock in Wisconsin, while the other might have a working arrangement with an independent dock company for the handling of its ore traffic,

the total charge being the same in both cases. Under these circumstances, the State would assess a much heavier tax against the company owning its own dock in Wisconsin, which would be a palpable discrimination not justified by the facts. These are further illustrations of the fact that there is no relationship between track mileage and dock charges, and that any attempt to prorate dock charges outside the State on the basis of track mileage is arbitrary and unconstitutional.

The record shows that wherever special charges are assessed for terminal service on commercial freight, such as switching, demurrage or storage, it is customary for Minnesota to tax 100% of such earnings when accruing in Minnesota and nothing when they accrue outside the State. The same rule applies to charges for storage of baggage and some elevation charges, and wharfage (R. 57-58, 118). It seems clear that this is logical and proper, because charges of this character do not vary with line haul mileage. There is no relationship between them. If all transportation charges were divided into a line haul charge and a separate charge made at each end for switching and loading or unloading, these separate charges should be handled the same way and apportioned 100% to Minnesota if within the State and nothing if outside.

If the outside terminal service in question here were an ordinary switching and delivery service, which is actually a part of the transportation, it might be argued that there must be a similar terminal service in Minnesota, and that it would be improper for the railway to apply a part of the total single charge to the outside switching service, unless it also applied a similar portion to the switching service in Minnesota, which would then be taxable 100% in Minnesota. Granting that this argument might be sound in the case of an ordinary outside switching service, which is part of the transportation, and

which has some counterpart in Minnesota, it is not applicable in the case of such a unique service as this Wisconsin dock service, which is a treating rather than a transportation service, and which has no counterpart, either in Minnesota, nor as far as the record shows, at any other place in the world.

In order to illustrate the difficulty in the present case more clearly, let us suppose, that a railroad should establish a charge of $1.00 for transportation of wheat from Montana to St. Paul and another charge of $1.25 for the same transportation, but including the milling of the wheat into flour in transit at Fargo, N. D. Clearly, there would be no impropriety in its computing and in setting aside upon its books, the 25 cents out of the total charge of $1.25 in the latter case, as revenue from the milling operation in North Dakota. If it should do so, there would be no logical basis upon which Minnesota could insist that a mileage prorate of the flour milling revenue should be used when computing the amount of railroad earnings in Minnesota, or the value of the tracks in Minnesota. Minnesota's share of the $1.25 charge, which includes milling in transit outside the State, should be no greater, in cents, than her share of the $1.00 rate which does not include milling. She might criticize the segregation of the revenue allocated to the milling operations as being unreasonable or unduly large. She might insist that a part of it was really transportation revenue and not milling revenue. But she could not insist that all of it was transportation revenue and she could not insist that a mileage prorate of all of it should be allocated to Minnesota.

In the case of iron ore, there are several processes which the ore must undergo before the pig iron can be delivered to the steel mills. If the ore contains an unusually large percentage of earth, it may be and often is put through a washing plant in

order to remove a part of the useless earth and avoid transporting it. This is usually done close to the mine and by the mining company. Secondly, ores of different grades and with different percentages of iron, silicon, sulphur and other constituents must be mixed in order to produce a proper grade for the blast furnaces. In Colorado and Alabama, presumably this is done either at the mine or at the furnace. In Wisconsin, it happens that it is done by the railroad company in transit, but is no more a part of transportation than is the washing process.

It is not inconceivable that the steel mills who ultimately consume the iron might wish to reduce steamship transportation charges by removing all of the foreign matter from the ore at the Head of the Lakes and reducing it at that point to pig iron by a blast furnace process. It is not inconceivable, that it might be found convenient and economical for the railroad to perform this service at the Head of the Lakes, and to include the charge for it, together with the charge for transportation in one single total charge to the shipper. If this were done in Wisconsin, there is no logical reason why a computation of the amount earned in Minnesota should include a mileage prorate or any other prorate of the revenue derived from operating the blast furnace. Even if the railroad had made no segregation of the total charges upon its own books, it should be permitted to make one, and deduct a reasonable amount of the total charge to cover the blast furnace service, before reporting its transportation revenues to Minnesota.

Many more pockets and much larger docks are required for the mixing and grading of ore than for the mere unloading of cars and loading of steamers, because when grading is being done, the pockets cannot be filled to capacity as the cars come in. Only a small amount of ore of a given grade may be

dumped into one set of pockets, and the balance of the capacity of the pockets must be held empty until another consignment of ore of the proper grade for mixing is received. According to the evidence in this case, this may take several days or weeks, so that a large number of pockets must be kept only partly filled at all times. Besides additional plant and additional investment which are thus required, it is obvious that there must be considerable additional switching involved in selecting particular cars containing particular grades of ore from among those on hand in the classification yard, and in returning the unwanted cars to the yards, to be held there until required. In this process, the same car may have to be switched several days in succession.

It is clear that all this additional plant capacity and investment, and all this additional switching is not required for the transportation of ore. If it were not for the treating process which is required, solid train-loads of ore could be run from the mine directly on to the docks, dumped into the pockets, and the cars returned to the mine for immediate reloading. This would require much fewer pockets, much fewer cars and much less switching service. The reason why the railroad performs the mixing and grading service is not because it is necessary to or any part of transportation, but because it happens that the mixing and grading service can be more economically performed by the railroad during the process of transferring ore from cars to pockets, than it can be done either at the mine or the furnaces.

The fact clearly appears, therefore, that the dock service does include treating or manufacturing processes, as distinct from transportation as would be the milling of wheat into flour in transit. This service has no counterpart in Minnesota or elsewhere. It involves additional expense and additional investment, and warrants and receives additional revenue. There

must of necessity be added to what the line haul charge alone would otherwise be, some factor to cover this dock service. The Railroad Company and the Dock Company computed what this factor in the charge should be, and recorded the computation in a written contract, by which the amount was awarded to the Dock Company. The State does not attack the reasonableness of the amount. It points to no counterpart of this service in Minnesota. It would follow, therefore, that even if we were to disregard the decisions quoted in the first part of this argument on the question of mileage inequality of value and mileage inequality of earnings, the constitutional application of the Minnesota statute to these particular earnings must be made impossible by the mere fact that the services are no part of a line haul, that they have no relation to mileage, that they are in part at least not a part of transportation at all, either terminal or line haul, and that neither the amount of earnings in Minnesota or the value of property in Minnesota can be made to vary one iota according to whether these services in Wisconsin are performed or not, or according to how much is paid for them, or according to whether they are performed in Wisconsin or Seattle.

In our case, emphasis is given to this argument, by the fact that the manufacturing, treating and storage processes which were being carried on in Wisconsin, were being handled by a separately organized subsidiary corporation, under the terms of a written contract which specifically allocated a fixed portion of the total charge as compensation for the Dock Company's service. This suit is brought against the Great Northern Railway Company to recover a tax on 81% of the Dock Company's earnings. We may grant that the State might attack this contract as fraudulent, or as awarding to the Dock Company an unreasonably large proportion of the total charge.

Minnesota might properly make a claim that a part of the amount awarded to the Dock Company was really line haul revenue, and was being paid to the Dock Company in bad faith. But she makes no such claim in this case. She does not claim that the division of the total charge is unreasonable. She asserts the right to tax her mileage prorate of every cent of the total charge, including whatever the Dock Company was justly entitled to for providing the additional plant, additional investment and additional switching required for the mixing and grading processes. This clearly she cannot do without violating the Federal Constitution.

The Minnesota statute declares that the proportion of interstate revenue taxable in Minnesota shall be "based upon the proportion of the mileage within the State to the entire *mileage over which such business is done*", (italics ours) and apparently contemplates revenue from business that is done over mileage, i. e., line haul revenue. If it were construed as thus limited, there could be no objection to it, at least when applied to an interstate line of approximately uniform value and earnings. However, in this case, the Supreme Court of the State has given it a much wider construction than that. It has made the Statute declare in effect that the mileage prorate shall apply even though a single mile outside of the State is forty times as valuable as the average mile in the State; that it shall apply to separately computed revenue, specifically set aside for terminal service performed entirely without the State; that it shall apply to such charges even though they are fifty times as great per mile as the average charge per mile within the State; and that if an interstate railroad shall render, outside of the State, any manufacturing, treating, or storage service, which is performed in transit, although not a part of transportation, and although performed by a subsidiary corporation,

the mileage prorate shall be applied to the entire revenue, including such portion as is fairly attributable to that service. As thus construed, the Statute is made to provide in effect, that a railroad cannot compute or set aside a specific portion of its total charge, for terminal services or for non-transportation services which it may perform outside of the State; that it cannot organize a separate corporation to perform such service; and that if it attempts to do so, it must still allocate to Minnesota a track mileage prorate of such charges, and must itself pay the taxes thereon.

Whether the amounts actually set aside for dock service and paid to the Dock Company were proper amounts and constituted a reasonable division of the entire charge or not, it seems clear from the foregoing decisions that it is incumbent upon the State to make *some* deduction from the total charge before applying her mileage prorate. She has not done so in this case. She has depended entirely upon the presumption of uniformity and equality, while the undisputed facts show that such a presumption is inapplicable here, and she is insisting that any revenue attributable to the treating process must be lumped with the rest. She may consider our payment to the Dock Company excessive and unreasonable, but this does not excuse her from determining upon an amount which in the judgment of her taxing officials is proper, and deducting that before applying the mileage prorate. When inequality of value and earnings, and a non-transportation character of part of the service are shown, Minnesota cannot prorate the entire earnings, and to attempt to do so without any allowance whatever for the outside excess value or earnings, or for the earnings attributable to the treating process, is unconstitutional.

Nor is it necessary for us to offer evidence that the amount of the resulting tax is unjust or inequitable, in the sense that

it is in a greater amount than the State could lawfully assess by any proper method. In such cases as *Fargo v. Hart*, 193 U. S. 490, and *Wallace v. Hines*, 253 U. S. 66, the taxpayer was not required to allege or prove that the amount of the tax was inequitable, but only that the method was improper. It may be that if the State had confined its tax to Minnesota property and Minnesota earnings, it could have levied an equal or greater amount of tax by some lawful method. We are not required to negative this. It is enough that we have shown that the State has adopted a method which in fact taxes property and earnings in Wisconsin. In *Oklahoma v. Wells Fargo*, 223 U. S. 298, the Express Company did not attempt to show that the amount of the tax was greater than the State could lawfully levy by any proper method. In all of these cases, the mere fact that the State has used a system or method which tends to tax property actually outside the State, has been enough to condemn the tax, regardless of whether or not the same amount of tax might have been defensible if determined by some other method.

Position of the State Court.

The opinion of the State Court says that "the evidence as to the values of specific portions of the ore line is far from satisfactory". The Court questions whether the investment account is properly charged as regards capital or maintenance. This is surprising, because the only witness, Mr. G. R. Martin, explained very fully (R. 59, 62, 94) that the accounts had been carefully kept covering the money actually invested in construction work from the beginning, and that from the time the Interstate Commerce Commission promulgated its rules and regulations, the accounts had been kept strictly in accordance with these rules and regulations. The exact cost of each

separate dock and the date of its construction were stated in detail (R. 69-62, 97-98, 100). It is true that the total investment as of years prior to 1907 was not given, but the totals as of the later years make it very clear that the investment per mile in the dock property must have been very much higher than in the track, even in the earlier years, and a description of the physical structures and large number of yard tracks owned by the Dock Company makes it obvious that the value per mile of that property must always have been very much in excess of that of the property in Minnesota. Moreover, this judgment covers a tax assessed for each separate year, and if we can establish unconstitutionality for any one year or for any five years of the period involved, the judgment must be reversed. We certainly show that for each one of the years 1908 to 1912, the tax was unconstitutional.

The State Court also declares that this evidence was given "apparently" upon some other theory, and that "there was no claim of unconstitutionality" in the trial court. Paragraph seven of our affirmative defense was before the trial court, and it specifically stated the grounds of unconstitutionality asserted here, and the evidence offered before the trial court supported it. The Supreme Court did not reject the constitutional question upon this ground. On the contrary, it heard and considered the constitutional argument and upheld the validity of the statute. The last two sentences of the opinion (R. 231) read, "We cannot see that the statutory scheme of taxation is unconstitutional or that the tax which it imposes works a hardship upon the defendant through an excessive valuation. Such earnings give the defendant's property great value which reflects itself in taxes". Regardless of how effectively the constitutional question was raised in the trial court, it clearly appears that it was raised and considered in the Supreme Court

and decided adversely to our position. The validity of the statute was sustained, and the question is before this Court as effectively as though the full constitutional argument had been presented at every step in the proceedings.

The State Court indicates some uncertainty as to whether we expect to claim that the entire gross earnings tax statute is unconstitutional, even when applied to ordinary revenue. The Court intimates that if that is our intention, there should be a more definite inquiry into the values of our other lines. In reply to this we may simply state that we are not claiming that the Statute is wholly unconstitutional or that it is unconstitutional as applied to ordinary revenue. Our only claim is that the application of the Statute to this particular revenue derived from the operation of Wisconsin docks is unconstitutional. We believe that the evidence is ample to support this contention, standing as it does wholly uncontradicted and unquestioned.

The only other suggestion of the State Court, in answer to this portion of our argument, is contained in the last paragraph of the opinion, where the Court points out that the entire property devoted to the ore service must be considered as a unit, including tracks in Minnesota and the docks in Wisconsin. It seems to be suggested that the docks would have no use, and, therefore, no value if the tracks in Minnesota did not originate the ore. It is suggested that the railway should be valued as a going concern. While the Court does not expressly say so, we assume that its feeling was that Minnesota could tax a part of the value of the docks because she contributed to that value through furnishing the ore for transportation. If this is the argument which is intended, it can be readily answered. The entire plant devoted to ore service including tracks in Minnesota and docks in Wisconsin may have a large going concern

value, but the fact remains that only 60% of that value is in Minnesota and not 81%. The total going concern value, whether it be higher or lower, is reflected in and measured by the gross earnings. Minnesota is undoubtedly entitled to tax her fair share of these, but she cannot tax them all, because a part of them are earned in Wisconsin. Nor can she tax 81% of them, because much more than 19% of the plant is in Wisconsin, and more than 19% of the service is performed there. After granting all that the Court says, the fact still remains that in this particular instance, a mileage prorate is not a fair or proper method of dividing the total value and total earnings, whatever they may be.

Ore Line Properly Considered Separately.

In the foregoing argument, we have treated the case as though the ore line were our only line of railroad. If this were so, or if the ore line were owned by an entirely independent company, operating that line alone, we believe that the State would not attempt to sustain the tax in this case. Under the decisions of this Court above cited, it would be invalid without any possibility of doubt.

But our opposing counsel state that the Great Northern Railway Company owns several other lines of railroad crossing the Minnesota boundary at different points and that we have terminals in the Twin Cities which may be more valuable than our Wisconsin ore docks. They urge that on the lines radiating from the Twin Cities, because of the great value of these terminals, a mileage prorate probably allocates to Minnesota too small a proportion of the earnings, and that there is probably an under-assessment in Minnesota on these lines which would offset the over-assessment on the ore lines.

Counsel also point out that if an exact allocation of the revenue on every shipment of all commodities moving over the Great Northern Railway Company were to be made according to the value of the line, we should probably find many of them where the mileage allocation is unfavorable to Minnesota and many others where it is too favorable. They urge that we should not be permitted to select items of the latter sort and build up a case by showing that we are over-assessed on these items, while ignoring the other traffic on which we are favored by the mileage prorate, and which probably restores the balance.

It may well be doubted whether any under-assessment on other lines would serve to justify the over-assessment in this case, even if such offsetting under-assessment were proven. Ordinarily an under-assessment on one piece of land is no defense against an over-assessment on another piece owned by the same man. An under-assessment against the Great Northern Railway Company upon property in Minnesota will not justify a tax against the same company by Minnesota upon property located in Wisconsin. And similarly an under-assessment on one item of earnings should not justify an over-assessment on another item.

In reply to this, it is contended that this is not a separate tax upon separate items of earnings, but a lump sum tax upon total earnings attributable to the State. This same contention, however, has already been overruled by this Court. In *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, the State attempted to levy a tax on interstate earnings of a steamship company. The tax was collected semi-annually, and the State argued that it was, therefore, a lump sum tax on a fund in possession of the steamship company and not a tax upon specific earnings. But the Court pointed out on page 341 that the receipts from interstate commerce "are followed and caused to

be accounted for by the Company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing) for which the Company is called upon to pay for tax." If in our case the tax in question here must be regarded as a tax upon the "specific receipts" for Wisconsin dock service, then it is obvious that the State cannot justify a tax upon them by pleading an under-assessment upon some other property or upon some other earnings in Minnesota. Under this decision, even if the existence of valuable terminals in the Twin Cities or the fact that our proof is confined to only a portion of our traffic, were sufficient to raise an inference of some offsetting under-assessment elsewhere, this would not be a defense against the over-assessment on the ore earnings.

But even if an under-assessment elsewhere is to be held sufficient in law to justify this over-assessment, we must remember that there is no evidence in this record that the Great Northern Railway Company has any Twin Cities terminals, or that they are more valuable than the ore docks in Wisconsin or the terminals in Seattle, Portland, Tacoma, Spokane and many other cities along the line. Indeed there are only the vaguest hints in the record that we own any lines of railroad other than the ore line. Any argument based upon our ownership of valuable Twin Cities terminals must be based on common knowledge or judicial notice.

Moreover, the mere fact that a railroad company may own terminals located in Minnesota which are more valuable than any terminals in any other state along the line, does not in itself afford any indication whatever that a mileage prorate of interstate earnings results in an under-assessment in Minnesota or that the mileage prorate is unfavorable to Minnesota. The more valuable terminals in Minnesota may handle a correspondingly greater number of shipments. The total earnings

tax on the greater number of shipments may be more than enough to pay an adequate tax on the higher value of the terminals. We cannot ordinarily determine whether a mileage prorate of earnings is fair by merely comparing the total investment in two states, without considering relative traffic density.

What we must compare to get an accurate result is the total investment *per car handled.* To illustrate this, let us suppose that a hundred small country stations outside the state each originates one car per day which moves to the Twin Cities terminals. The Twin Cities would thus receive 100 cars per day and would require trackage facilities for 100 cars while each of the small country stations would require a track sufficient for only one car. Presumably the Twin City terminals would be approximately 100 times as valuable as those in any of the single country towns. However, if we were to compare the investment in each state in the plant used in handling any one of these cars or any group of them coming from a single station, it would not be fair to credit the Minnesota investment with the entire cost of the Twin City terminal. Only 1/100 of the Twin City terminal would be used in handling the cars from any one country station, and it would not be proper to charge the total investment over and over again, against every car. Only 1/100 of it should be compared with the total investment in the country station. This illustration makes it clear that it is the investment in plant *per car handled* in each state and not the total investment in each state that must be compared, if we should attempt to prorate the earnings on any single shipment in proportion to the value of the plant used in transporting it.

To give one more illustration, suppose that we have 365 small country stations, each shipping one car a year to the

Twin Cities on successive days. Each of the country stations would require track capacity for one car and the requirement in the Twin Cities would not be much greater since it would handle on the average only one car a day, for 365 days. If one car a year were handled from a given country station, 100% of the investment in the loading track at that station would have to be carried by that one car. But the investment in a similar track in the Twin Cities terminal would be divided between 365 cars. The rate charged for each car would have to include interest on 1/365 of the investment in the Twin Cities terminal, plus interest on 100% of the investment in the country loading track, plus all other overhead and operating expenses. Therefore, in prorating the earnings on such a car between the two states upon the basis of capital charges, the country terminal should be credited with a capital charge 365 times as great as the city terminal, which is only another way of saying that the comparison must be made, not between total investment, but between investments per car handled.

It is clear from these illustrations that the existence of a terminal in Minnesota more valuable than any terminal in any other state does not in itself indicate that a mileage prorate of earnings results in an under-assessment in Minnesota. The contrary may be true. If the number of cars coming into the Twin City terminals is sufficiently large, the investment *per car handled* may be smaller in Minnesota than in any other state, and in that event a mileage prorate would result, not in an under-assessment, but in an over-assessment for Minnesota. The greater number of cars would give Minnesota more taxes than she is entitled to. We give these illustrations simply to point out that even though it were established in the record here that there are terminals in Minnesota more valuable than the Wisconsin ore docks, that fact taken alone would not in-

dicate nor even tend to indicate that a mileage prorate of our interstate earnings on our general traffic other than ore is not sufficiently favorable to Minnesota, or that there is any under-assessment there, to offset the over-assessment on the ore lines.

It is true that in considering the ore line and the ore traffic, we have compared total investments in Wisconsin and Minnesota, instead of comparing investments per car handled. But the ore traffic is of such a unique character that the result is the same in this particular case, whether we compare total investment or investment per car handled. The earnings which are in question here include the earnings, not on any part of the traffic handled into or out of the ore docks, but on every car entering or leaving those docks over a period of 12 years. Those cars originated, not at a large number of different stations scattered throughout different states over the entire line, but at a small number of mine spurs, located within the restricted area of the Mesabi Range, and entirely within the State of Minnesota. The investment in ore line in the State of Minnesota, as stated in the record, includes the investment in every one of the mine loading spurs. Therefore, if we desired to compare the investment per car handled in each state, we would simply divide the total investment in Wisconsin and the total investment in Minnesota by the same number of cars. The resulting quotients would necessarily bear the same ratio to each other as the total investments. It is this unique character of the ore traffic that makes it possible for us to single it out, as we have done, for comparison upon the basis of total investment.

The opinion filed by the Supreme Court of Minnesota (R. 228-229) points out that while the tracks serving the Range mines in Minnesota are used exclusively for ore traffic, and while the docks and 7 miles of adjacent track in Wisconsin are

used exclusively for ore, the intermediate movement is over main line tracks which are also used for grain and other freight traffic and for passenger traffic. The Court points out that this joint use exists between Saunders, Wis., and Swan River and Hinckley, Minnesota, and objects that we do not take any account of the other freight and passenger traffic, and do not show how the use value of this jointly used track should be apportioned between ore and non-ore traffic. However, as the Court points out, the traffic other than ore which uses these tracks is the same traffic in Minnesota and Wisconsin, and necessarily has the same volume in each state. A glance at the map will indicate that the mileage used jointly by ore and non-ore traffic in Minnesota, is about five times that used jointly in Wisconsin. Therefore, any apportionment of a part of the investment value to traffic other than ore would necessarily give the non-ore traffic an apportionment about five times larger in Minnesota than in Wisconsin. This would leave a correspondingly smaller portion of the total investment chargeable to the ore traffic in Minnesota, and would throw a still larger percentage of the investment chargeable to ore in Wisconsin.

The investment figures in the record indicate that the twenty miles of track in Wisconsin cost approximately $81,000 per mile. If the cost of the thirteen miles used jointly by ore and other traffic were deducted entirely from the Wisconsin investment, and charged entirely to other traffic, and even if no deduction whatever were made from the investment in Minnesota, there would still remain in Wisconsin, chargeable to the ore traffic, about 34% of the entire investment in ore lines and docks, as compared with a mileage pro rate of only 18.45%. In other words, the tremendous dock investment is the controlling

factor in this case, and the use of tracks by other traffic is negligible. The investment per car handled for ore in Wisconsin would still be nearly double the mileage prorate, even if the Wisconsin investment in jointly used tracks were omitted entirely.

Except for the purpose of determining accurately the investment per car handled, we can think of no reason why a segregation between ore and other traffic using these tracks would be either necessary or desirable. Earnings from other traffic have already been segregated and reported to the State. The tax upon Minnesota's mileage prorate of these earnings has already been paid and the State has accepted it as satisfactory. There is no controversy as to that.

We repeat, therefore, that the ore traffic is of such a unique and segregated character, making exclusive use of such valuable facilities, that a comparison of total investment in ore facilities in the two states does conclusively establish an overtaxation of ore earnings in Minnesota; while the mere statement of a large total investment in Twin Cities terminals in Minnesota means nothing and does not indicate or tend to indicate that there was any offsetting under-taxation in Minnesota on other traffic. The value of the Twin Cities terminals is not shown in this record, but if it were, it would be a wholly immaterial fact, standing by itself, and without any figures as to traffic density, no matter how large such value might be.

We have seen that besides claiming that the value of the Twin Cities terminals would in itself offset the value of the Wisconsin ore docks, the State also points out that if the earnings on every shipment of all commodities were to be allocated between states, exactly in proportion to the investment in the plant in each state, such an allocation would probably vary in both directions from a mileage prorate, and we should find

cases where the mileage prorate is too favorable to Minnesota and others where it would be unfavorable. Therefore, they argue we should not be permitted to select only items where the mileage prorate is too favorable to Minnesota, and to build up a case of over-assessment on such items only, and ignore the others.

We agree that it would be improper to select certain shipments of grain moving between the Twin City terminals in Minnesota and country stations in North Dakota, and to argue that, because of the great value of the Minnesota terminals, the value per mile in Minnesota chargeable against this traffic is higher than the value per mile in North Dakota. This would be fallacious because we would be charging against this particular traffic, the entire value of the Twin City terminals, a large proportion of which is required by and used for traffic in other commodities, and to and from other states. Only a small proportion of the value of the Twin City terminals would be properly chargeable against grain traffic to and from North Dakota. The total value of the terminal cannot be charged against any selected portion of the traffic using it or against anything less than the entire traffic.

The same thing would be true of the Wisconsin ore docks, if they were used for general traffic as well as for ore traffic. We could not fairly charge the entire investment against the ore, and argue from that that the investment per mile in Wisconsin chargeable against ore was higher than that in Minnesota. But, as we have already pointed out, the ore traffic is unique, in that it constitutes the total traffic using the Wisconsin docks, and not only a selected portion, and in that it originates entirely at a restricted group of terminals in Minnesota, the entire value of which has been segregated and credited to Minnesota.

It may be possible, theoretically at least, to select individual shipments of grain or other general commodities, and to make a fair comparison of the value per mile in different states properly chargeable against each shipment. To do this on a fair basis, we would have to determine the proportion of the investment in each state fairly chargeable against each shipment, or in other words, the investment in each state per car handled. If the fallacy which we have been pointing out were to be avoided by this means, and a fair basis for comparing the values in different states were to be computed, we might find that, even on this fair basis of comparison, over-assessments in Minnesota would appear on some shipments and under-assessments on others. The State might still argue that we should not be permitted to select those items on which over-assessments appeared and to ignore the others. It may be argued that this is virtually what we have done in the case of the ore.

We think that there is merit in the State's contention that we should not ordinarily be permitted to select certain commodities such as grain, or to select traffic between certain handpicked stations in two states, and to show that as to this selected traffic, an over-assessment exists in Minnesota. In such a case, the fact that the commodities or the stations selected appeared to be handpicked, and to be selected from other traffic without any logical basis of distinction, except the one fact that the selected items disclosed a mileage inequality of value, would in itself condemn the selection.

But in this respect, the ore traffic differs fundamentally from traffic in any other single commodity, or between any other selected group of stations, because there is a logical reason for confining our showing in this case to the ore traffic, and omitting any showing as to other traffic. The ore traffic is unique. It moves 100% from a small group of loading spurs in a re-

stricted area in Minnesota, to a single group of docks in Wisconsin, and constitutes 100% of the traffic moving between these points. It is capable of segregation and analysis in a manner that is not possible in the case of any other traffic. The earnings from ore constitute about 25% of the entire interstate earnings of the Great Northern system which are taxable in any part in Minnesota. The ore traffic taken by itself produces an annual gross revenue larger than that of the average Class I railroad in the United States.

The earnings of this Dock Company had been omitted from our reports to the State of Minnesota for 12 years and the State had made no protest. After 12 years it made a specific assessment against these earnings and brought this action involving ore earnings only, which we were called upon to defend. There is, therefore, a perfectly satisfactory historical reason why the showing in this case should be confined to the ore earnings. Moreover, as we have just pointed out, the peculiar character of the ore traffic makes proof of over-assessment much easier than in the case of any other traffic, because it is a segregated traffic, moving in such tremendous volume. This in itself would be an adequate reason for confining our proof to the ore earnings. The fact that a mileage prorate on these ore earnings is unduly favorable to Minnesota does not tend to suggest in any way that a mileage prorate on grain, lumber or other traffic would be unfavorable to Minnesota. There is nothing whatever in this record nor in our conduct in this action to give rise to the slightest suggestions of that sort, or to create the slightest doubt or suspicion as to our other traffic. We conclude, therefore, that, having shown this over-assessment of our ore earnings, we are in the same position as we would be in if the ore line were our only property. The fact that we have valuable terminals in the Twin Cities and the fact that

we handle other general traffic on our other lines are both irrelevant. Neither of them tends to suggest or prove that there may be any offsetting under-assessments elsewhere.

The State has argued that the mileage prorate which is adopted in these gross earnings tax statutes is based upon a presumption that interstate railroad values and interstate railroad earnings are approximately uniform per mile and that this is a presumption which applies to the system value and the system earnings as a whole, and that, until this presumption is overcome by evidence of lack of uniformity for the system as a whole, it remains conclusive. Therefore, it is said, a proven inequality as to one item of traffic, or one part of the system, would in itself tend to prove the existence of an offsetting inequality somewhere else. If the mileage prorate of ore earnings is excessive, then mathematically the mileage prorate of other earnings must be deficient in order to produce the predetermined system uniformity established by the presumption.

One answer to this is that no presumption of mileage uniformity as to system value and system earnings can include values and earnings from a manufacturing or treating plant outside the state. Assuming that miles of property used for transportation are uniform and will offset each other, there can be no "presumption" that because the Great Northern has a unique ore treating plant in the State of Wisconsin, therefore, she must have something of the same character or of offsetting value in the State of Minnesota.

But the most effective answer to this argument, based on a presumption of system uniformity, will be apparent if we consider the character of the Great Northern system. The Great Northern Railway system consists of what are in effect two almost separate railroads. One of them handles general traffic

and is comparable in every way with the Northern Pacific, Milwaukee and other lines serving the Northwest. The other is the ore line which is comparable with the Duluth, Missabe and Northern Railway of the United States Steel Company, and which handles a unique traffic, the gross revenue from which is one-fourth of the total Great Northern interstate earnings taxed by Minnesota. A proven inequality exists as to this ore railroad, and the State is trying to show that an offsetting inequality in the opposite direction exists on the other. She deduces this from the presumption of system uniformity, and argues that if the mileage prorate of ore earnings is excessive, then mathematically the mileage prorate of other earnings must be deficient in order to produce the predetermined system uniformity established by the presumption. In this way the established inequality on one distinct part of our railroad, the ore line, is used as proof of an offsetting inequality in the other direction on our general system.

As a matter of fact the presumption of uniformity is quite as applicable to the general traffic lines alone, excluding the ore lines, as it would be to the entire property. The general traffic lines excluding the ore line, are quite comparable with the entire system of the neighboring roads, and the presumption of uniformity certainly applies as to these neighboring comparable systems. If we should sell the ore line to another company, the presumption of uniformity would admittedly apply to the remaining part of our system.

There is nothing in the character of our general traffic lines excluding the ore line, to indicate that there are excessive values per mile in Minnesota. It is common knowledge that the contrary is true. Our mountain construction, our tunnels, our long bridges, and our snow sheds are in Washington and Montana. Our thinnest traffic is at the west end, and so, based

upon matters of common knowledge, the probability is, not that the investment per car handled is higher in Minnesota, but that it is lower than the system average.

The State's argument mistakes the character of the presumption of uniformity. There is nothing in the character of that presumption to make it more strongly applicable to the entire system than to the general traffic lines alone. It is not an established general premise applicable to the system as a whole, from which a deduction can be made syllogistically, as the State is attempting to do here. It depends upon probability, and the Court's common knowledge, and not upon any decree of any statute or constitution. This probability of uniformity exists for the system as a whole, simply because it exists for individual lines, and the system is the sum of individual lines. To deny that it applies to individual lines or to the group of individual lines constituting our general traffic lines excluding the ore line, is to overthrow the entire basis of the presumption.

If it were necessary for us to prove that we are overtaxed for the system as a whole, we submit that we have done so. Our proof as to the ore line, coupled with the presumption that there is uniformity, neither excess nor deficiency, on our general traffic lines, establishes this. We have shown that as to one-fourth of our total earnings on traffic crossing the Minnesota border and amounting to over eight million dollars a year, or more than the entire revenue of an average Class I railroad, the mileage prorate allocates at least 20% too much to Minnesota. The mileage prorate allocates 81.55%, whereas the investment prorate is only a little over 60%. The over-allocation amounts to nearly two million dollars a year in earnings, and amounts to approximately $70,000 a year in excess taxes. The total excess tax involved in this action is over half

a million dollars. Surely a showing of such a tremendous over-assessment upon such a large volume of traffic, handled under such unique and separable conditions, coupled with the presumption that the tax on the general body of traffic is no more and no less than fair in our case, as in the case of our companion railroads handling general traffic, is sufficient to carry conviction to the mind of the Court that there must be a substantial over-assessment here, not only for the ore line alone, but for the system as a whole. And as we have pointed out above, this conclusion is greatly strengthened by the fact that the excess earnings in Wisconsin are derived largely from a treating process which has no direct relationship to transportation or mileage.

In considering whether the burden of proving a universal negative in this case, by negativing any under-assessment on other traffic, should be imposed upon us in this case, it seems relevant to give consideration to the fact that such a burden would be one impossible to meet. We have already seen that a comparison of total investments in two states tells us nothing. It is the investment per car handled which must be compared. And it would not do merely to lump the total investment for the State and divide this by the total number of cars handled in the State, because some cars move over only a short mileage to or from a small station and use only a small part of the total investment in the state, while others move a long distance and through expensive terminals and use a large part of the investment. An accurate survey would require a determination of the revenue earned on each item of traffic between each station taken separately in Minnesota, on the one hand, and each station separately outside of Minnesota on the other hand. We would then have to compare the mileage prorate of this revenue with a value prorate of the revenue, based on in-

vestment in and out of the state in that portion of the line between each pair of stations. This would necessitate a finding separately of the mileage, and of the value, from each station in Minnesota, to every point on the State border crossed by a Great Northern line, and from every such point on the State border to each station outside the State. It would mean thousands and thousands of valuations for different combinations of routes and stations, and in each case the computation would be complicated by the necessity of considering the investment per car handled rather than the total investment. Manifestly, it would be physically impossible to make such a computation as this, and yet only by this method could we demonstrate that there is no under-assessment under a mileage prorate of our general traffic sufficient to offset the over-assessment on the ore traffic. The burden of proving such a universal negative would be one impossible to sustain.

If an under-assessment on other traffic is to be regarded as a defense, it would be much simpler to require the State to prove it if any such exists. It is easier to prove a particular affirmative than a universal negative. They could confine their proof to the particular traffic as to which the under-assessments were alleged to exist, without having to offer proof as to every item of traffic on the line.

This system of taxation is of the State's choosing. She has undertaken to deal with interstate earnings, and she does so at her peril. She can tax interstate earnings only after she has effectively excluded the portions which do not belong to her. She is aided in this task by the presumption of mileage uniformity. But when that presumption has been overthrown as to an important line of railroad, and as to 25% of all our taxable interstate revenue, it would seem not unfair to insist that the State make a proper deduction for Wisconsin dock earnings

before applying her mileage prorate, or else assume the burden of proving that there has been an offsetting under-assessment upon some other traffic.

CONCLUSION.

If the Great Northern Railway Company were to form a subsidiary corporation engaged, outside the State of Minnesota, in operating a flour mill, an ore washing plant, or a storage, mixing and grading plant for ore, and if it were to handle whatever wheat or ore might be offered to it by the public, and to collect from its patrons an independent charge per ton for the service at the plant, Minnesota would never contend for an instant that she could tax any portion of the earnings. A statute purporting to do so would be clearly unconstitutional. But in this case the Supreme Court of Minnesota has said that the Minnesota Statute should be construed as attempting to do that very thing, and that it can properly and constitutionally do so, where the following conditions exist:

1. The commodity handled in the milling and treating plant must be a commodity that has been hauled or is to be hauled in part through the State of Minnesota, immediately before or immediately after being processed, and while still in the possession of the railway company.

2. There must be a single charge assessed against the owner which shall include both the line haul transportation service and the processing service.

The Minnesota Statute is made to declare that if these two conditions exist Minnesota can tax a proportion of the total charge including not only the transportation charge but also the revenue attributable to processing, and that the proportion of the *total* revenue so taxed shall be governed by the mileage

proportion of the *track haul*. The portion of the revenue attributable to the processing shall be taxed 10% in Minnesota if the plant is at Seattle and 80% in Minnesota if it is at Allouez, Wis. It is not incumbent upon the State to make any computation or deduction of the portion of the total revenue attributable to the processing service. Nor will the railway company be permitted to make such a computation or deduction of its own. If it attempts to do so, Minnesota can still tax the portion deducted, regardless of its fairness and reasonableness. The mileage prorate will still be proper, even though the plant outside the State is forty-six times as valuable per mile as any single mile in the State, and even though the portion of the charge allocated to the service outside the State is fifty times as great per mile as that for the service inside the State, and even though the service itself is vastly more valuable, elaborate and costly than any mile of service inside the State. How much further the State Supreme Court would go does not appear. If this principle is applied where the property is fifty times as valuable, presumably it would be applied where it is one-hundred times as valuable, or a thousand times as valuable. The only requisites for supporting a tax in Minnesota seem to be that there has been or is to be a consecutive transportation of the commodity partly in Minnesota, and that there must be only one total charge to the public. We submit that Minnesota has no such power over services performed outside of the State during a transit in interstate commerce. She has no such power over the total charge collected by a carrier for an interstate transportation plus a treating service performed outside the State in transit. The power ends when she has adopted a fair and reasonable method of computing what portion of the total revenues are earned within her own borders. That method must make some provision for excluding

revenue attributable to such a service as we have described here, and for excluding revenue derived from an investment as great as the one described here located outside the State. As she has not done this, we believe that the attempted tax must be condemned.

What seemed to be the only reply to this argument, seriously pressed by the State, is the suggestion that we might avoid this tax by bringing into Court a record of each one of the millions of interstate traffic movements handled on our entire system during the course of the year, and which move partly in Minnesota, and by submitting with each movement a separate valuation of the portion of our track used in Minnesota by such shipment, and of the portion of our track used outside of Minnesota, which would involve thousands of different valuations. The State defends this tax upon the general presumption of uniformity in value per mile and in earnings per mile, but she would deny to us the benefit of the same presumption as to our general traffic lines and our general traffic earnings. After we have proven an error amounting to several millions of dollars of earnings, as to one important line and as to one very important item of revenue, we must presume, not that the mileage prorate as to other lines is fair, but that it is equally wrong in the other direction, and we must proceed to establish a universal negative by disproving this as to all of our other items of revenue. We must do this even though the single mile of dock property outside the State is forty-six times as valuable as a single mile within the State; even though the traffic using the ore property is more than one-fourth of all our interstate traffic crossing any Minnesota boundary; and even though the revenue being taxed is derived from a treating process outside the State, having no relation to track mileage ,and not a part of the transportation. We believe that this is an accurate state-

ment of the State's position in this case, and we believe that to state it is to disprove it.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1928.

NO. 106.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

In Error to the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

NO. 107.

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

THE STATE OF MINNESOTA.

Appeal from the Supreme Court of the State of Minnesota.
Filed April 9, 1928.

REPLY BRIEF
OF PLAINTIFF IN ERROR AND APPELLANT.

F. G. DORETY.
THOMAS BALMER.
Attorneys for Plaintiff in Error and Appellant.

Dated January 2, 1929.

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REPLY BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

The position of appellant and plaintiff in error in this case is that the evidence clearly shows that far more than a mileage

prorate of the value of the plant used in producing the total ore earnings is located in Wisconsin; that far more than a mileage prorate of the total effort and total operating cost is expended in Wisconsin; that the mixing and grading of the ore which is a process entirely independent of transportation is performed entirely in Wisconsin; and that therefore much more than a mileage prorate of the total charge is fairly attributable to Wisconsin, and very much less than a mileage prorate is fairly attributable to Minnesota. Therefore, we say that a Minnesota tax on a mileage prorate of the total charge is a direct tax on earnings accruing in Wisconsin, and that it is a burden on interstate commerce and a taking of property without due process of law. The gist of the argument is that because of the great amount of physical plant required and used in Wisconsin, and because of the greater effort and operating cost expended there, a proportionately greater part of the earnings is fairly attributable to Wisconsin. The argument rests on the assumption that the proportion of interstate earnings fairly attributable to any part of the line depends upon the value or investment in that part of the line and upon the effort and operating cost expended there.

We desire to take up in turn the arguments offered on behalf of the state in reply to this contention.

That Earnings are More Susceptible to a Mileage Prorate, Than is Physical Value.

On pages 28 to 33 of the state's brief, counsel argues that the Minnesota statute does not tax any property or value outside the state because it does not tax any property or value at all, but simply taxes earnings. They contend that earnings do not vary with cost or value of plant and cannot be definitely

and scientifically allocated between different portions of the road in proportion to the cost or value of each portion, but that there is a greater latitude in the allocation of earnings, and that a mileage prorate is a reasonable method of allocating them, and is, therefore, within the legislative discretion.

If the earnings are just sufficient to pay operating expenses plus a fair return upon total investment, it seems obvious that any apportionment of earnings must be made in proportion to investment, as otherwise the investment in one state might be left without a fair return. But counsel would probably argue that if the property has an investment value of only fifteen million dollars but should earn excessive net profits of say six million dollars per year or enough to pay a return on a value of a hundred million dollars, it could not then be definitely stated that the proportion of the investment in each state, which is relatively small, would necessarily control the apportionment of the earnings, which are relatively large, but that the earnings, or at least that portion of them in excess of the return on investment, might be allocated in proportion to service rendered and that miles of track are a fair method of apportioning service.

One answer to this argument is that there is no evidence in this case that the net profits from ore service exceed a return on the investment. Counsel point to the fact that 25% of the gross receipts of the Great Northern are earned upon this ore trackage which constitutes only 4% of the trackage in the state. This would indicate a heavy traffic density on the ore line, but it does not necessarily indicate large profits, because the rates may be correspondingly low so that the return per mile in net profits may be no greater than upon any other part of the system.

But even if we assume that there are large net profits derived from the ore service in excess of a return on the investment, and even if it were proper to allocate this excess upon a mileage basis, it would still remain true that at least enough of the profits to pay a return on the investment should be allocated in proportion to investment. In this case, Minnesota is not only taxing 81% of the excess profits if there are any, but she is also taxing 81% of that portion of the profits which should be regarded merely as interest on the investment. She is leaving for Wisconsin, an insufficient part of the earnings to pay a bare return upon the Wisconsin investment. Even if Counsel's argument were sound, and even if there were evidence of excess profits from the ore traffic, it would not justify a mileage prorate of the entire gross receipts from ore traffic.

But the argument in support of a mileage prorate of excess earnings is not sound. A mileage prorate of earnings may *seem* to be fair because track mileage *seems* to be a fair method of measuring and prorating service rendered. But this seeming fairness has no other basis than the general assumption that one mile of track contains as much physical property as another. The service of transportation consists in overcoming inertia and resistance. The commodity must be moved through a certain amount of space, up and down certain elevations and across rivers and other obstacles. The amount of service performed can only be measured by the amount of resistance overcome. One mile of space may be equal to another, but more service is performed in moving traffic up a mile of expensive mountain grade, across a costly river bridge, or through a tunnel piercing the heart of a mountain barrier than is performed in moving the same traffic across a mile of level country. More service is performed in rendering a mile of dock service which requires 76 tracks, costly steel and concrete ele-

vated structures, large operating expenses and considerable periods of time, than is performed in the three or four minutes which is required to haul one car in a large trainload over a mile of single track. The amount of resistance which is overcome, and, therefore, the amount of service which is performed, is reflected first in the amount and extent of the physical plant which is required to overcome it, and second, in the amount of labor and operating cost which is expended.

In ordinary railroad transportation these will average up about the same per mile of road, and, therefore, a mileage prorate *seems* to be a fair method of apportioning earnings just as it seems to be a fair method of apportioning physical value. But in this case, it appears that forty or fifty times as much money was expended in creating that part of the physical plant included in the dock property as was expended in creating an average mile of track in Minnesota. This means that the mile of dock property contains forty or fifty times as much physical plant, (because relative cost is an accurate measure of the relative amount of physical property) and that it is, therefore, contributing forty or fifty times as much service as any mile in Minnesota.

The total earnings, including excess profits if any, accruing in two states, cannot be fairly apportioned between them except upon the basis of the relative service performed in each state. One unit of service is entitled to as large a share of the profits as is any other equal unit of service. Track mileage is a fair basis for apportioning earnings only to the extent that it may be regarded prima facie as measuring the amount of physical plant, and, therefore, the amount of service performed. When it is shown in a particular case, by the undisputed evidence, that track mileage does not afford an accurate measure of physical property or of service performed, it is entitled to

no greater weight in apportioning earnings, than it is in apportioning a physical valuation. The application of a mileage prorate to a railroad on which the amount of physical property and the amount of service performed on a single mile outside the state is forty or fifty times as great as on a single mile inside the state, becomes meaningless and illogical, and, therefore, entirely arbitrary.

Counsel argues that such cases as *Fargo v. Hart*, 193 U. S. 490, and *Wallace v. Hines*, 253 U. S. 66, are not applicable here because they deal with apportionments of value and not apportionments of earnings. But we submit that earnings accruing in Wisconsin are just as much protected by the Constitution as property located in Wisconsin. The same Constitutional principles which prevent Minnesota from taxing the latter also preclude her taxing the former.

Greater "Use Value" in Minnesota.

Counsel for the state next contend that even though our evidence correctly and conclusively shows a disproportionate amount of investment or cost of plant in Wisconsin, nevertheless cost does not determine value, and the portion of the plant in Minnesota, although less costly per mile may be equally valuable or more valuable per mile. This argument is based upon the assertion, on page 27 of the state's brief, that the Great Northern Railway Company controlled the ore traffic through ownership of iron mines. This being so, counsel argue that the control of the traffic inhered in and was a part of the value of the Minnesota trackage. If the Great Northern had not owned its own docks, it could have shopped about among independent dock companies and secured a low dock charge that would barely pay interest upon the cost of the dock, and

it could thus have retained for the lines in Minnesota the benefit of all of the profits in the ore traffic, above actual cost of handling and interest on the investment. Therefore, this "use value" which represents the profit from ore traffic, over and above these costs, should be attributed to the Minnesota trackage and is taxable in Minnesota.

By the same reasoning, if the Great Northern had owned the Wisconsin docks but not the intervening trackage, it could have shopped about among the different railroad lines in Minnesota to secure the cheapest possible rail haul, and it could thus have added to the Wisconsin dock property the entire "use value" of the ore traffic. The argument works both ways.

The fact is, of course, that in order to realize any profit whatever from the ore traffic, the entire plant is necessary, including the trackage in Minnesota and the dock in Wisconsin. The "use value" inheres no more in one part than in the other. The ownership of the mines is in the Company and the "use value" inheres in the entire property. It cannot be arbitrarily claimed by nor attributed to either state. The only fair way to apportion it is to divide it in proportion to the physical property, attributing to each equal item of physical plant, an equal share of the "use value."

The same reasoning would be true of grain originating in Montana or lumber originating in Washington. In order to realize any profit from transporting these commodities, trackage is required through many states. The amount of the traffic and its routing depends quite as much upon the market demand at the destination as it does upon the supply at the source. The traffic could not move at all unless there were commodities at one point and a demand for them at another point, and unless all parts of the trackage in all of the states were provided. It would be entirely arbitrary for any state

to claim a greater "use value" for its mileage because it originates the traffic. It would be just as consistent for the destination state to claim a greater share of the "use value" because it provides the market, without which the traffic would not move.

The ownership of the mines by the Great Northern Railway Company is not an incident of the Minnesota trackage, any more than it is an incident of the Wisconsin docks. If this mine ownership can be used by the Company to add value to the Minnesota trackage, it can likewise be used to add value to the Wisconsin dock, and it was in fact so used. When counsel for the state contend that the Dock Company received an exorbitant division, they are in effect contending that the Great Northern was actually using its mine ownership to add value to the Wisconsin docks rather than to the Minnesota trackage. We submit that if the entire ore property had any value in excess of investment, the excess value must be added to the Wisconsin dock investment just as much as to the Minnesota trackage investment, and that a prorate between the states based upon investment in the physical property will measure the "use value" in each state just as truly as it will measure the items of physical property in each state. A mileage prorate to Minnesota is, therefore, just as arbitrary and unconstitutional when applied to this "use value", if there is one, as it is when applied to the physical property, since the mileage prorate is far in excess of the investment prorate, and therefore of the value prorate

TOTAL TAX LEVIED DOES NOT EXCEED A FAIR AD VALOREM TAX.

Counsel seek to establish from reports of the Minnesota Tax Commission, that if the average rate of levy in Minnesota, or in the counties where these tracks are located, were applied ad valorem to the value of the property as measured by its investment, the resulting ad valorem tax would be larger than the total tax accruing to Minnesota under the gross earnings tax statute, and that therefore the total tax claimed here is not unfair. This argument is improper in the first place because this court does not take judicial notice of reports of state officers such as the Minnesota Tax Commission. *First National Bank of Wellington v. Chapman*, 173 U. S. 205 at 217.

But even assuming that these reports were properly before the court, and that it were established in the record that the state might properly have assessed ad valorem taxes larger in amount than the total taxes which she claims under the gross earnings tax statute, that fact would not justify her in taxing earnings accruing in Wisconsin. The same argument might be carried to exreme lengths. It might justify the state in taxing 100% of the ore earnings, instead of only 81%. It would equally justify her in taxing revenue on transportation carried on entirely in the state of Wisconsin and never touching Minnesota, or in taxing a line of railroad located entirely in Wisconsin.

The decision in this case cannot turn upon the question whether a larger total ad valorem tax might properly have been levied. It must turn on other portions of the argument. If the other portions of our argument have failed to establish the fact that the attempted tax is in fact a tax upon Wisconsin earn-

ings, then our case must fail. On the other hand, if we have established the fact that the state is here attempting to tax Wisconsin earnings, the tax is just as illegal as though it had been assessed in a case where the entire service and the entire property were located in Wisconsin.

Counsl for the state cite decisions of this court on pages 33 to 36 of their brief from which they draw the conclusion that our case must fail unless accompanied by proof that the total tax claimed is excessive in amount as compared with taxes imposed upon other property within the state. But none of the cases cited involves any question of allocation between states. None of them involves any question as to whether one state is taxing property or earnings in another state. The only question involved was whether a gross earnings tax as such could be sustained in lieu of a property tax. Upon this question, this court declared that the gross earnings tax was proper so long as it did not impose an amount in excess of what might properly be levied by other methods. But the court never declared that one state could tax property or earnings in another state merely because the total amount of tax levied was no larger than might properly have been levied by other means upon property within the state. Even if Minnesota were to exempt us entirely from taxation on Minnesota property, this would give her no right to tax property in Wisconsin or other states.

Character of the Evidence and Findings.

Counsel for the state contend that the character of the evidence showing a greater proportion of the cost of plant in Wisconsin is unsatisfactory because it does not cover the earlier years, and because the evidence that was submitted in this

case was evidence that had been collected at some prior time for another purpose, and because no findings were based upon this evidence by the trial court.

We submit that if the evidence is sufficient to prove an over-assessment in any one year or in any group of years, the judgment, which is for a lump sum covering 12 years, must be reversed. If the assessment for any year is too large, the total is too large. It is immaterial that the evidence does not cover the earlier years, and it is entirely immaterial whether the information was collected for the first time for use in this case, or whether it had already been collected for some other purpose. The facts themselves are not controverted.

As to the fact that the lower court did not make findings on this subject, that objection is one which could be considered only by the state supreme court. The state court undertook to and it did decide the Constitutional question upon the evidence, without requiring findings by the lower court and we submit that the only question before this court is the question whether that evidence requires a reversal of the decision.

Counsel for the state contend that the mixing and grading of the ore must be considered a part of the transportation and not an independent manufacturing process, because the supreme court of the state in its opinion stated that the dock service was incidental to transportation (state's brief page 12). This is a conclusion reached by the state court from the evidence. If the evidence and the facts clearly establish unconstitutionality, a declaration by the state supreme court contrary to the evidence will not sustain constitutionality. If a carload of potatoes of all sizes from large to small were shipped, and if the railway company should establish a plant for sorting, grading and sacking them according to size, and should actually perform this service, no finding by a state

supreme court could make this service a part of transportation. The fact that it might be "absorbed in the tariff" and covered by a single charge would not permit Minnesota to tax the earnings from such a service outside the state, and no finding by the state court that the service was a part of the transportation could alter the fact. The grading and sorting of ore is in fact just as independent of transportation as would be the grading and sorting of potatoes.

Exorbitant Dock Company Division.

Counsel contend that the division paid to the Dock Company was "exorbitantly high," because the Dock Company paid dividends of eleven million dollars in 12 years on a five million dollar investment or an average of a million dollars a year, which is approximately twenty per cent per year.

In 1912, approximately fourteen million tons of ore were handled. This amount is determined by dividing the total payments to the Dock Company (R. 5) by 15 cents which was the amount of the division at that time. Dividends of a million dollars on fourteen million tons amount to approximately 7 cents per ton. If the dividend were reduced to six or seven per cent, the profit per ton instead of being seven cents would be two or three cents, and the alleged excess would be four or five cents per ton. In other words, counsel's argument amounts to a contention that the division in that year should have been ten or eleven cents instead of fifteen cents.

Assuming that this reasoning were sound, it still leaves ten cents per ton which the state is wrongfully attempting to tax. If the amount paid to the Dock Company is exorbitant, let the state determine upon an amount that is proper and fair and deduct that. What we are contending is that the state

cannot tax the entire charge including what is fairly attributable to the dock service. She must make some deduction. If she is unwilling to accept our division, let her make one of her own.

Unity of the Gross Earnings Tax.

On pages 18 to 21 of the state's brief, counsel contend that the gross earnings tax is a single unit which cannot be divided into its separate items or separately attacked, and that the statute cannot be held invalid as to a portion of the company's revenue and sustained as to the balance. It is said that the entire tax for the year must stand or fall as a single assessment.

We submit that the issue thus raised is not before this court. The sole issue here is whether the state is entitled to a judgment in this action for the particular tax which we allege to be assessed on Wisconsin dock earnings. Whether this statute is valid or invalid as to the other items of earnings on other parts of the system is a question which can be decided when the issue is raised.

If the issue were raised, we believe that it would have to be decided against the contention of the state. Where a statute is susceptible to two constructions only one of which is in accordance with Constitutional requirements, the latter construction should be adopted. The statute applies in terms to the earnings of railway companies operating partly or wholly in Minnesota. It does not apply in terms to earnings of their subsidiary companies operating exclusively in Wisconsin. It applies in terms to business which is done over mileage, and is impliedly confined to earnings from railroad business. It does not expressly levy a tax upon earnings from the grading and storage of ore or from dock service. We are not attacking

the express wording of the statute but simply the construction of it which has been adopted by the state supreme court.

Moreover, even if these were strictly railroad earnings, and even if they were earnings of the Great Northern Railway Company and not of its subsidiary, so that the statute were specifically applicable to them, the mere fact that its application to these particular earnings would be unconstitutional would not render it unconstitutional as a whole. The tax is in fact a separate assessment against each item of earnings. See *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, from which we have quoted on pages 42 and 43 of our original brief. It is true that the railway company reports its earnings to the state as a unit, but the law requires the railway company to compute them item by item, apportioning each item of interstate revenue in proportion to the mileage involved in that particular item. We see no reason why the statute cannot be sustained in all cases and as to all items where the presumption of mileage uniformity is not overthrown. The method prescribed by the statute is a proper method, and it remains so until the attempt is made to apply it to earnings which are shown to belong outside the state. That application must fail, but there is no reason why the tax should not be sustained in all other cases.

Counsel do not expressly argue in this brief, as they have in previous briefs, that the alleged "unity" of the gross earnings tax is such as to require proof that the mileage prorate for the system as a whole is unduly favorable to Minnesota. We had anticipated that argument and replied to it on pages 41 to 56 of our original brief, and there seems to be no occasion for adding to or enlarging upon that argument here.

It is argued briefly on pages 19 and 20 of the state's brief that the gross earnings tax is in effect a legislative assessment

resting upon the legislative determination that a tax so computed will impose only a fair burden upon the property of the company, equivalent to that which would result from an ad valorem levy, and that there is involved in this determination the assumption that each railway company will have appropriate terminals both inside and outside of the state which contribute to its earnings. In reply to this we submit that it would not be "due process" for the Legislature to fix an ad valorem tax, with reference, not to the value of the property in the state nor to earnings in the state, but to earnings accruing outside the state. A legislative determination of an ad valorem tax cannot be wholly arbitrary, and it would be wholly arbitrary if based upon earnings accruing to the company from outside the state. We believe that the legislative determination can stand to the extent that it is based upon earnings within the state, and that the balance of the assessment must fall. The question here is whether it must fall in part. Whether the balance of the assessment must also fall is a question that is not before this court.

Counsel do not expressly argue here that terminals inside the state tend to offset the terminals outside the state, such as the Wisconsin dock terminals. They have made this argument at some length in previous briefs and our reply is set forth quite extensively on pages 41 to 52, inclusive, of our original brief, which we have already referred to. There is nothing here to call for a repitition of that argument. The ore line is practically a separate railroad and a large one. Its earnings constitute 25% of all the interstate earnings of the Great Northern Railway Company taxable by Minnesota. The docks in Wisconsin as well as the originating terminals in Minnesota are used exclusively by ore traffic and every pound of ore that uses one also uses the other. The application of the

gross earnings tax to the ore earnings is a problem which must be considered independently of its application to the balance of the traffic and the remainder of the system. We submit that as applied to the ore earnings the statute is clearly invalid when construed, as the state court construed it, as calling for the taxation in Minnesota of earnings fairly attributable to service performed in Wisconsin.

Our Suppositious Cases.

a. *A two-mile tunnel in Wisconsin.*

On page 29 of our original brief, we state that much of the argument which we had previously been making would apply if the excess value outside of the state inhered in a five million dollar tunnel or a five million dollar bridge. On page 43 of the state's brief, counsel use this illustration to argue that Minnesota's mileage proportion, and, therefore, Minnesota's tax would be the same, whether the small amount of mileage outside of the state consisted of an expensive tunnel or of ordinary trackage. Counsel argue that since Minnesota's tax would remain the same in either case, this indicates that the mileage prorate is a correct basis. The fallacy in this reasoning is that counsel overlook the fact that if the small amount of mileage in Wisconsin included a five million dollar tunnel, an equitable total rate would have to be higher in order to pay a return on the additional investment. Where there was no tunnel, Minnesota would be taxing 98% of a lower charge. Where there was a valuable tunnel in Wisconsin she would be taxing 98% of a higher charge. Her total tax upon Minnesota property would, therefore, vary according to whether or not the railway company owned a valuable tunnel outside the state.

b. *An independent Dock Company.*

Counsel do not reply to this illustration, but offer instead a supposition that if the Great Northern connected with an independent company at the state line, it would probably obtain a division of more than 81.55% of the total charge. This is because the Great Northern is said to own the iron mines, and therefore, to control the traffic. But on the other hand, as we have already pointed out, if the Great Northern owned the dock and trackage in Wisconsin and bargained with one of several independent companies owning trackage in Minnesota, it could equally well obtain for the Wisconsin Dock service, a proportion of the total charge exceeding even the investment proportion. As a matter of fact, it owned or controlled both the Minnesota trackage and the Wisconsin trackage and docks, and its ownership of the iron mines added equally to the value of both.

c. *If the company had taken a lease of the dock.*

If we had leased the dock in Wisconsin at an annual rental, instead of actually owning it, the disproportionate investment argument would be just as applicable. The value of the property in Wisconsin we would be devoting to the ore service would be just as great, even though we rented the dock instead of owning it, and the portion of the earnings attributable to the dock would remain the same. The carrying charges would be paid out in the form of rental instead of in the form of interest or dividends. If the dock were located in Duluth, we concede that Minnesota could tax the entire property or the entire earnings, whether the dock were owned by us or only rented. There would then be no question of taxing earnings accruing in Wisconsin.

d. *The comparison between the Great Northern and a company using but not owning a dock in Wisconsin.*

On pages 30 and 31 of our original brief, we argue that of two competing railroads handling ore traffic and having similar mileage and similar volume of traffic in Minnesota, one might own its own dock in Wisconsin, while the other might pay a division of the through rate to an independent dock company for the handling of its ore traffic, the total charge being the same in both cases. We argued that under these circumstances, the state would assess a much heavier tax against the company owning its own dock in Wisconsin. Counsel for the state deny this and insist that each would pay the same tax. This is clearly not so. If one company paid a division of the total charge to an independent dock company, that division would not be a part of the earnings of the railroad company operating in Minnesota. It would clearly be entitled to deduct from the total charge collected by it, the amount of the division paid to the independent dock company. But the competing company owning its own dock in Wisconsin would, if the state's contention is sustained, be compelled to prorate its entire charge. One would pay a higher tax than the other, although the property, the service and the traffic in Minnesota would be the same on each line.

THE PRACTICE IN MINNESOTA AS TO OTHER TERMINAL CHARGES.

Counsel for state contend that charges for demurrage, switching and storage, which are taxed 100% if accruing in Minnesota, and not at all if accruing outside, are different in character from charges for grading and mixing ore, because they are no part of the transportation movement, but constitute a separate local service, performed for the convenience of the consignee,

and because the charge is separately assessed. We submit that the mixing and grading of ore is no more a part of the transportation than would be the sorting and sacking of potatoes, or the milling of wheat in transit. It is even less a part of transportation than switching or demurrage.

Counsel argue that switching and demurrage charges are different because charges are separately published and the service is not performed for all shipments alike, and the charges are collected only from shippers who require the service. We submit that a service which is not a part of the transportation, such as the milling of wheat in transit or the grading and sorting of ore, does not become a part of transportation merely because it is availed of by all shippers, nor is its character altered by the fact that the compensation is included with the transportation charge in a single toll. We mention the practice as to switching and demurrage charges, merely as a recognition of the principle that a mileage prorate is not applicable to a service which does not involve track mileage, and where the amount of the charge does not vary with the length of the haul. We believe that any part of the total ore charge which is fairly attributable to the dock service is just as much subject to this principle as would be a switching or demurrage charge.

Respectfully submitted,

F. G. DORETY,
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Attorneys for Plaintiff in Error and Appellant.

Appendix A.

Act of January 31, 1928, C. 14, 45 Stat. 54.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Appendix B.

Computation from figures in the record of payment to Dock Company, in cents per ton, required to pay (a) 6% interest on the investment, and (b) 6% interest on investment plus operating expenses, 1908 to 1912 inclusive (the only years for which investment figures are available). Figures in parentheses refer to footnotes.

cc. 1	cc. 2	cc. 3	cc. 4	cc. 5	cc. 6	cc. 7	cc. 8
Year	Tons (1)	6% on inv. (3)	Cents per ton required to pay 6% on inv. (4)	Dividend (5)	Excess of div. over 6% (6)	Excess per ton-cents (7)	Cents per ton required to pay operating exp. plus 6% (8)
1908 1909	10,036,235[2]	$230,221 229,684	4.6	$1,435,000	$975,095	9.7	14.3
1910	8,436,387	237,285	2.8	735,000	497,715	5.9	16.1
1911	9,791,802	323,909	3.3	1,000,000	676,091	6.9	15.1
1912	13,916,803	317,648	2.3	1,450,000	1,132,352	8.1	6.9
Total	42,181,227	$1,338,747	3.2	$4,620,000	$3,281,253	7.8	12.4

(1) Tonnage figures obtained by dividing total payment to Dock Co. (R. 5) by number of cents per ton paid. (R. 66-7).

(2) Figures for 1908 and 1909 are combined because no dividend was paid in 1908, the 1909 dividend being the product of both years.

(3) For investment figures, see (R. 60-62, 97-100).

(4) Column 3 divided by column 2.

(5) For dividends paid, see (R. 102).

(6) Column 5 minus column 3.

(7) Column 6 divided by column 2.

(8) Number of cents actually paid to Dock Co. (R. 66-67) minus column 7.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 106.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

Filed April 9, 1928.

BRIEF FOR THE STATE OF MINNESOTA.

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BRIEF FOR THE STATE OF MINNESOTA.

STATEMENT OF THE CASE.

The State of Minnesota brought action against the Great Northern Railway Company in the District Court of Ram-

sey county, Minnesota, to recover taxes for the years 1901 to 1912, inclusive, amounting to $536,402.18, together with penalties and interest running up to more than half a million dollars (R. 4). No recovery was allowed by the court for taxes for the years 1901 or 1902 and no penalty or interest was allowed for any of the years because all the taxes were included in the single assessment (R. 205). Judgment was entered in favor of the State for taxes for the years 1903 to 1912, amounting to $479,580.58 (R. 204), which amount bears interest at the rate of six per cent per annum from September 30, 1922, the date of the order for judgment (R. 211). The State appealed from so much of the judgment as denied its claim for taxes for the years 1901 and 1902 and its claim for penalty and interest. The company appealed from that part of the judgment which held it liable for taxes for the years 1903 to 1912. The Supreme Court of Minnesota affirmed the judgment on both appeals. *State of Minnesota vs. Great Northern Railway Company*, 160 Minn. 515. The company thereupon sued out a writ of error to this court, which was dismissed for want of jurisdiction. *Great Northern Railway Company vs. Minnesota*, 273 U. S. 658 (decided January 17, 1927). Thereafter the company petitioned the State Supreme Court for a vacation of its former judgment and for a reargument. The petition was granted (R. 223-224). Upon the reargument the court considered and determined the constitutional questions here involved and again affirmed the judgment of the trial court. *State of Minnesota vs. Great Northern Railway Company*, 174 Minn. 3 (decided March 2, 1928) (R. 224-231).

The case is now here for a review of the judgment entered pursuant to the decision of the state court (R. 231).

STATEMENT OF FACTS.

In Minnesota property of railway companies has always been taxed by the so-called gross earnings method. This method of taxation was originally provided for in charters incorporating railway companies as they were issued by the territorial and later by the state legislature. In 1871 the people of the state adopted a constitutional amendment which provided, in substance, that any law theretofore existing, or thereafter enacted, providing for the taxation of railway companies by this method, might be repealed, amended, or adopted only on submission to and approval by a vote of the people. Since 1871 each law affecting the taxation of railway companies has been so submitted. The system has, however, remained the same since the beginning, changes having been made only in the rate. By 1887, as indicated in Laws 1887, chapter 11, Laws 1889, chapter 235, and General Statutes of 1894, section 1669, the system had become one of general application. No railroad company has ever, in the history of this state, attacked the law either upon the ground of the invalidity of the system as such, or upon the ground that the method of apportionment operated to burden interstate commerce or to tax property beyond the confines of the state. The system has been satisfactory to the railway companies of the state and to the people.

The tax is one imposed upon all property of each railway company held and used in its railway operations. It is in lieu of all other taxes. In terms it requires every railway company to ascertain and compute its entire earnings upon the business done wholly within the state and a proportion, based upon the proportion of mileage within the state to the entire mileage over which the particular transportation

service occurs, of earnings on interstate business. The railway company is not required to report the details of that computation. It furnishes to the state a single statement of its gross earnings within the year, and upon this statement the tax is computed. There is statutory provision for auditing these reports and for the assessment of additional amounts on account of any errors or omissions which the railway company may make in its gross return.

The appellant, in apparent compliance with this law, reported its earnings and paid the taxes computed thereon in each of the years 1901 to 1912, inclusive. In the course of time, the public examiner of the state examined the books and records of the company for the purpose of determining whether or not its taxes had been correctly computed during each of those years. He reported the omissions which are involved upon this appeal, and pursuant to the statute computed additional taxes to be assessed against the company on account of its alleged omissions.

The omissions related wholly to receipts coming to the company for hauling iron ore over its lines between points on the Mesaba Range in northern Minnesota and Allouez Bay at Superior in the state of Wisconsin, a haul distance of 107 miles, 81.55 per cent of which mileage was in Minnesota. The allegation was that the company had not reported 81.55 per cent of its receipts from the movement of this ore, but had deducted from each ton of ore transported the sum of twenty-five cents from May 1, 1902 to July 31, 1909; twenty-two cents from August 1, 1909 to December 25, 1911, and fifteen cents from December 26, 1911 to December 31, 1912.

The company admitted that the alleged deductions had been made and that the state's quantities, amounts and cal-

culations were correct, and it asserted that the deductions were properly made before making the mileage apportionment. It alleged that it had paid all of the amounts so deducted to the Allouez Bay Dock Company, or its predecessor the Duluth, Superior & Western Terminal Company "as and for their respective proportions of the entire transportation charges, for their services in the transportation and handling of iron ore in the state of Wisconsin" (R. 6), and it alleged that it had allowed and paid to the Allouez Bay Dock Company and its predecessors, in the amounts referred to, substantially that portion of the whole tariff charge (eighty cents per ton until December 26, 1911, sixty cents thereafter) which the property investments of the Dock Company bore to the investments of the Great Northern in the trackage over which the ore moved (R. 10). And there were allegations in different forms of statement that if the gross earnings laws should be interpreted so as to uphold the state's claim it would violate various provisions of the state and federal constitutions (R. 8-12).

On the trial the evidence related almost exclusively to the relationship which existed between the Great Northern and the company owning the docks at Allouez Bay. It involved various corporations and a partnership, which the company caused to be formed or which it took over and controlled and dominated. Mainly, it went to the issue as to whether or not there were any real divisions of the earnings between the Great Northern and the Allouez Bay Dock Company, or its predecessor Duluth, Superior & Western Terminal Company, and as to whether there was, regardless of the singleness of ownership and operation of lines over which ore was carried to and over the dock to Allouez Bay, performance of a localized service at the docks, for which a charge might

have been made and which might have been deducted from the earnings before apportionment under the Minnesota statute.

The constitutional objections urged by the company in its answer were never referred to in the trial court. There was no error assigned on them upon the company's appeal to the Supreme Court. They were not discussed in the briefs or upon the argument in the Supreme Court. They were first again referred to upon a supplemental petition for rehearing after final decision in the Supreme Court.

The trial court found that all of the ore, after 1902, was hauled by the Great Northern over its own lines and docks and delivered by it aboard vessels. It found that the Allouez Bay Dock Company and its predecessors were agencies through which the Great Northern held ownership of the docks and adjacent trackage. It found that there were no divisions of earnings with the Dock Company or its predecessors (R. 195-202). It found:

> "The said ore line, from the said first day of January, 1901, to the said 31st day of December, 1912, from the mines in Minnesota to and including the docks at Allouez Bay, was a single, continuous railway line. It was projected, built and operated as such for the purpose of carrying ore from the mines to be unloaded into vessels beside the docks, and for no other purpose. There was but a single charge, during all of said period, for a continuous unbroken railway service. There was no separation of said lines into separate or connecting parts, yards, or terminals at Saunders, Wisconsin, at the Omaha Crossing, so-called, or at Allouez Bay Dock. There was no separate or local railway service performed at any of said points. Service at the docks was a nec-

essary and appropriate part of the transportation business in hauling ore over said line" (R. 200).

That finding was sustained on appeal.

The form and subject-matter of appellant's argument necessarily involves an attack upon the findings of the court below. Counsel do not rest their case upon the proposition that the existence of valuable terminals outside of the state demonstrate the invalidity of the Minnesota statute. They say that they do not challenge the validity of the law in so far as it taxes the company's property by employing line haul earnings as the measure of the tax. The assertion is that earnings growing out of purely local services furnished by valuable terminals owned by a subsidiary and situated beyond the boundaries of the state are taken into the calculation, with the effect of taxing such foreign property. The court below found in substance that this terminal was in fact owned and operated by the Great Northern and that it performed there no local service, separate from the line haul, distinguishable from the customary and familiar freight or passenger terminal service. The record amply sustains these findings but the challenge of counsel makes necessary a fuller statement of the detailed facts than otherwise would have been necessary.

The testimony relates to transactions affecting the ownership of three sections of line over which ore was carried: the part from the mines to Saunders, Wisconsin, about one hundred miles; the part from Saunders to Allouez Bay, about six miles; and the Allouez dock with its approach, about one mile.

Prior to 1901, the dock at Allouez Bay and approaching trackage (Omaha crossing) was bought by the Duluth, Superior & Western Terminal Company, all of whose stock was

controlled by the Great Northern Company, at a receiver's sale for $760,000 (R. 97, 15).

In 1901 and prior thereto the Eastern Railway Company of Minnesota operated as part of its railway system the trackage between the mines and Saunders. The Great Northern owned all of its stock (R. 17, 29, 36-38). On May 1, 1902, the Great Northern took a lease of all of the lines of the Eastern Company and thereafter the ore was moved by and in the name of the Great Northern (R. 18, 46). Until 1906, no printed tariff was issued. But the testimony is that charges, services and conditions of transportation were as described in the subsequently published tariffs. The tariff issued in 1906 and all those subsequently issued provided for the transportation of ore by the Great Northern from the mines to Allouez Bay and the loading of it on boats at a prescribed rate (Plaintiff's Exhibits "E," "I"—R. 146-157). The tariffs named no connecting or associated carrier and fixed a single charge for the service performed, including delivery to the vessel.

During 1901 and 1902, the trackage from Saunders to the dock, and the dock itself (there was but one dock then, others being added at intervals thereafter) were held in the name of Duluth, Superior & Western Terminal Company (R. 44-46). All of the stock of the Terminal Company was held in the name of the Lake Superior Company, Ltd., which was a partnership composed of the officers of the Great Northern acting as trustees of the Great Northern (R. 15, 26—Plaintiff's Exhibit "C," R. 140).

In 1903 the Great Northern caused the Allouez Bay Dock Company to be organized. The stock was at first held by the Lake Superior Company, Ltd., in trust for the Great Northern (R. 16).

On June 1, 1903, the Great Northern took in its own name from the Terminal Company a lease of the trackage from Saunders to, but not including, the docks (R. 46). It caused the Terminal Company to lease the docks to the Allouez Bay Dock Company (R. 16, 17). Then the Great Northern immediately took a lease of the docks from the Dock Company (R. 29, 30—Plaintiff's Exhibit "J," R. 157).

In 1908, by resolution of its directors, the Great Northern Company directed the Lake Superior Company to cause the Terminal Company to deed and convey the trackage east of Saunders to the Great Northern Company and to convey the docks to the Allouez Bay Dock Company (R. 17, Plaintiff's Exhibit "N," R. 179-182).

During all this period these various companies had common officers (R. 16-25, 32-34).

On July 1, 1907, the trackage from the mines to Saunders, which had theretofore been under lease from the Eastern Railway Company of Minnesota, was conveyed to the Great Northern (R. 34). In April, 1913, effective as of December 31, 1912, there was conveyance of the docks to the Great Northern (R. 104, 105).

There were other stock transfers hardly susceptible of explanation. In 1908 the stock of the Allouez Bay Dock Company was sold to the West Missabe Land Company for a consideration, it is said, of $100,000 (R. 88), although in the preceding year that stock had paid dividends of $2,000,000, and during all the period of the company's existence regularly earned dividends amounted to more than $1,000,000 annually (R. 102). All of the stock of the West Missabe Land Company was, until 1906, owned by Lake Superior Company, Ltd., in trust for the Great Northern, but in 1906 it was assigned and transferred to the

Great Northern Ore Trustees. In the "Ore Trust" the Great Northern Company divorced its mining properties from railway properties, assigning them to stockholders of record on December 7, 1906 (Plaintiff's Exhibit "O," R. 182). In April, 1913, effective December 31, 1912, the Great Northern bought back from the West Missabe Land Company the stock of the Allouez Bay Dock Company at a stated consideration of $600,000 (R. 88, 103).

In 1901 and 1902, the testimony is, the Terminal Company was paid twenty-five cents per ton for its share of the ore haul from Saunders to the docks and for the services performed at the docks (R. 66). This arrangement was not in writing. When the Great Northern, on June 1, 1903, leased the trackage from Saunders to the docks from the Terminal Company, and after the leasing of the docks by the Terminal Company to the Allouez Bay Dock Company, an agreement was executed under which the Great Northern Company agreed to pay to the Dock Company the same sum of twenty-five cents per ton for the right of moving its cars upon the docks and for the work of the Dock Company in unloading them (R. 31). It is perhaps significant that this agreement required the Great Northern Company, when requested by the Dock Company, to "pay the employes of the Dock Company" and "all bills for materials and repairs and otherwise" incurred in the operation of the docks, not exceeding, however, the amount to be paid by the Great Northern at the rate of twenty-five cents per ton (Plaintiff's Exhibit "J," R. 157, 159). The testimony is that this lease remained in effect until December 1, 1908 (R. 30), and there was no agreement in effect between that date and August 1, 1909, but the payments at the rate of twenty-five cents per ton continued (R. 30). There was a new lease as of

August 1, 1909, fixing the Dock Company's compensation at twenty-two cents per ton (Plaintiff's Exhibit "K," R. 160, 30). The testimony is that this lease remained in effect until December 26, 1911, when by oral modification the Dock Company's compensation was reduced to fifteen cents per ton (R. 30, 27).

There was testimony descriptive of the trackage and yards east of Saunders, of the docks and of the detailed operations of those yards and docks: in substance that there were trains moving ore from different mines and of different grades and that it was necessary to break up these trains and assort and switch them so that the ore might be dropped through the hopper bottoms of the cars into the proper bins upon the docks. It was said that ore sometimes stuck in the cars and there was necessity of employing men with long poles to remove it from the cars. In the spring and late months of the season, ore froze and there was the necessity of thawing it. It was said that these switching and unloading operations were carried on by employes of the Dock Company under supervision of the manager of the dock, and that they were not Great Northern employes (R. 45, 49-52).

The Supreme Court said among other things of the testimony in reference to the separation of ownership:

> "No carrier in absolute control of the transportation line from mine to boats, owning in its own name the legal title to all of the line except the dock, having the advantages of the ownership of that through the ownership of all of the Allouez stock, and having so profitable a haul, would part with the last mile. The Great Northern did not. Whatever the form and whatever the agency the Great Northern kept the beneficial own-

ership. From the beginning it controlled the ore traffic. It received all the freight earnings. It was the beneficiary of all the income from its two organizations, the Terminal Company and the Allouez Company, which it officered and controlled" (160 Minn. 515, 521).

And as to whether or not there was a separate local service for which a charge over and above the transportation charge might have been, or was, assessed, it said:

"The defendant never regarded the service in its yards or the service on the docks as something for which an additional charge could be made. No such charge ever was made. Everything which was done with the ore from the time it started from the mines and until it was put into the boats and the boats trimmed was included in the haul. Reference is made to the thawing of ore on the dock, sometimes necessary in the late fall. Compared with all the ore passing into the dock it amounts to nothing. No specific charge is ever made for it. The expense is absorbed in the freight rate on all the ore and not charged against the specific ore receiving the service. The same is true of the storage service furnished to particular ore. The ore receiving the service is not charged for it. It is absorbed in the freight charge on all ore. Reference is made to the services in the yard between Saunders and the Omaha dock. Sorting the cars was necessary so that when they went upon the dock they would be unloaded in the proper boats. Every railway has extra work at its terminals. The expense of it is absorbed in the tariff. We do not get from the evidence the notion that the yard sorting or the work on the docks was an unusual burden. The cars moved in solid trains of hopper bottom cars,

made a quick run from the mines, were sorted and hauled onto the high docks, were cared for promptly at the beginning of lake transportation, and were on the way back to the mines with little waste" (160 Minn. 515, 523-524).

In support of its claim that the charge made or allocated for the dock service was a fair one, some figures were introduced as to the company's investment in Minnesota trackage, Wisconsin trackage, and the dock over which the ore was carried. None were offered for the years 1901 to 1907. The testimony was that those introduced were available because they had been prepared for another purpose (R. 114). It is upon this testimony, so accidentally coming into the record, that the present appeal is based. The testimony was that the books showed the following investments in the docks, the trackage between the docks and the Minnesota state line, the trackage in Minnesota between the state line and the mines, and in cars and equipment used in hauling the ore:

	Docks	Docks to State Line	Trac[illegible] Min[illegible]	[illegible]ment
1912	$5,294,137	$1 [illegible]76,689	$10,878[illegible]	$7,178,051
1911	5,398,476	1,631,450	10,739,8[illegible]	7,217,214
1910	3,954,743	1,600,842	10,365,297	6,726,037
1909	3,828,069	1,549,498	9,912,206	5,701,088
1908	3,837,014	1,531,886	8,982,903	5,705,042

(R. 60-62, 114.)

Incidentally, too, it appears that at some time after 1903 the value of the Allouez Bay docks represented only 14.25 per cent of the value of the company's properties constituting the Superior Terminal, which terminal, beside the ore docks, included grain elevators, merchandise docks, coal docks, yard tracks and shop buildings (R. 96).

It further appears that until May 1, 1902, the Eastern Railway Company of Minnesota operated as a unit a connected group of lines in northern Minnesota. On May 1, 1902, these lines were leased to the Great Northern Company, and on July 1, 1907, they were conveyed in fee. Apparently they represented a book investment of $31,783,545.04, because that was stated in the deed to be the consideration for their transfer (R. 167). They included: (1) a line from Hinckley, Minnesota, to Duluth, Minnesota, which line passed through Superior, Wisconsin; (2) a line beginning at a connection with the above described line at Boylston, Wisconsin, to Fosston, Minnesota; (3) a line between Hinckley, Minnesota, and Coon Creek, Minnesota; (4) a line connecting with the Boylston-Fosston line at Swan River, Minnesota, to Virginia, Minnesota; and (5) a line connected with the Boylston-Fosston line at Brookston, Minnesota, to Ellis, Minnesota. The system included about 400 miles of line. The relationship of these properties to the ore trackage as a matter of common knowledge and judicial notice is disclosed in the following portion of the opinion of the Supreme Court (174 Minn. 3, 7-8—R. 228-229):

> "To maintain its claim of unconstitutionality the defendant in a way segregates 107 miles of its railway system, 87 miles from its 2,000 miles in Minnesota, and 20 miles from its mileage in Wisconsin. It does not do this quite completely. It takes no account of the grain traffic coming to the head of the lakes over its line through Hinckley to the west and southwest, nor from its Fosston branch which reaches northern Minnesota and the states farther west and Canada. It takes no account of incoming freight except iron ore. It takes no account of outgoing freight. It takes no

account of passenger traffic coming to the head of the lakes, either to Duluth or Superior, or originating there and going west over its lines. It takes account of one commodity, iron ore, and rejects all others. But all this incoming and outgoing passenger and freight traffic passes over the tracks which carry iron ore in Wisconsin, with the exception of seven miles. Its ore traffic passes from Saunders, Wisconsin, as far north as Swan River, or perhaps farther, in Minnesota, over tracks which carry through traffic, passenger and freight, both ways. There are branches or stubs in Minnesota which are exclusively for iron ore and the usual tracks in connection with open pit mines. None of its freight or passenger traffic can reach its docks or depots at Superior or Duluth without passing over tracks which carry iron ore. What the use value is of trackage employed in common by ore and non-ore traffic, and how it should be apportioned, there is nothing to tell us. We do know that a transcontinental line makes common use of much of the ore carrying trackage in reaching the head of the lakes and in going from it, and that it can not reach the Great Lakes except by using trackage which its ore traffic uses in both Minnesota and Wisconsin."

SUMMARY OF ARGUMENT.

1. The gross earnings tax is a property tax and in lieu of all other taxes on the company's property used for railway purposes. Each year's tax is a single indivisible tax on the entire property measured by the aggregate gross earnings without reference to source. The tax sought to be enforced here consists of inseparable parts of the total tax

which should have been paid by the company during each of the years involved. It can not be treated apart from the tax in its entirety, and it can not be held invalid without holding invalid the gross earnings tax system. If there be no valid basis for this tax, there was no valid basis for assessment of any gross earnings tax at any time.

2. The arbitrary allocation of from fifteen to twenty-five cents per ton made by the company on account of "dock service" is sought to be defended on the theory that it constituted a service separate from transportation. But the findings of the court dispose of that theory, for they are to the effect that whatever was done on or about the docks was a part of the transportation movement comparable to the familiar switching, sorting, unloading and storing that is an incident of all transportation movements, freight and passenger. And conceding for sake of argument that an allocation of "dock revenue" was proper, the allocation made was exorbitantly high.

3. The constitutional questions now urged were set out in the answer and never again referred to until on the supplemental petition for re-argument after final decision in the State Supreme Court.

The question of value in Minnesota and in Wisconsin of the company's ore line property was not litigated. For the purpose of justifying allocation of earnings between the Great Northern and the Dock Company, there came into the record figures, available because prepared for another purpose, showing investments from 1908 to 1912. There was no showing of investments from 1901 to 1908. There was no finding by the state court of either investments or values. Upon such a record this court should not undertake to determine values.

Nor is there any showing either of the cost or of the value of the entire system in Minnesota, or of the relation of either cost or value of the ore line to the rest of the system.

The use value of the Minnesota portion of the ore line far exceeds the cost. The source and control of the entire traffic is in Minnesota. The dock has no use value apart from the source of traffic, and has no value above costs. If apportionment were made on the basis of property values, there should be attributed to Minnesota at least as much as the mileage pro rate gives to it.

Allowing the distribution of costs as claimed by appellant, and distributing the investment in equipment over the length of the ore line, and spreading the use value over mileage, would give to Minnesota approximately the mileage apportionment which the law prescribes. At least there can be no assumption that values in Minnesota and values in Wisconsin are equal to costs.

Since the tax is not based on a mileage apportionment of values but on a mileage apportionment of earnings, there can be no ground for the contention that property outside the state is taxed unless it be demonstrated that earnings do not correspond with mileage (and hence with values) as measured by a mileage pro rate of earnings. There is no such demonstration.

We are dealing with a substituted tax or a commuted tax applying a fixed rate to earnings—not to ascertained values. There can be but a single test of the validity of such a tax either under the commerce or due process clauses—does it amount to more than would be legitimate as an ordinary tax upon the company's property within the state. Calculations of taxes which might have been assessed on the general property basis show that the gross earnings taxes for the years

in question were far below what would have been legitimate as ordinary taxes.

Cases in which property of a whole railway system is valued, and the state's part is brought in by track mile apportionment for the purpose of taxing the value so apportioned at the ordinary rate, are clearly distinguishable.

4. The supposititious cases made by appellant tend to support rather than destroy the validity of the gross earnings tax system.

5. The miscellaneous local charges credited 100% to Minnesota for purposes of taxation—switching, storage, demurrage—are of a character different from the dock service. They begin only when the transportation movement has ended, and are performed only for the convenience and account of the consignee.

ARGUMENT.

I.

THE GROSS EARNINGS TAX SYSTEM MUST STAND OR FALL IN ITS ENTIRETY. IF INVALID IN ITS APPLICATION HERE, IT IS INVALID ALTOGETHER.

Appellant says:

> "We are not attacking the validity of these statutes as applied to interstate rail line earnings of the railroads. This court has held that similar statutes are constitutional as applied to line haul earnings. What we are contending is that there would be a violation of the federal constitution in applying such a statute to the Wisconsin dock revenue involved in this case" (Appellant's Brief, p. 6).

Again:

> "* * * We are not claiming that the statute is wholly unconstitutional or that it is unconstitutional as applied to ordinary revenue. Our only claim is that the application of the statute to this particular revenue derived from the operation of Wisconsin docks is unconstitutional" (Appellant's Brief, p. 40).

But the gross earnings tax is a single tax upon all of the property of the company within the state. It can not be valid in part and invalid in part. The legislative declaration in effect is that a fixed percentage of gross earnings measured and apportioned in accordance with the statutory declaration will produce a fair tax on all of the company's property. There is no separation of the company's system into lines or parts of lines; there is no separation of road-bed and structures. There is no separation of earnings as respects their source. There is the single definition which describes earnings arising from railway operations and there is an apportionment the aim of which is to reach earnings attributable to property within the state. The law commands and permits a single gross computation of earnings, a report of the total of such earnings, and payment of the tax as a single sum. Of course no one would assert that each mile of track within the state will produce equal gross earning or that each mile of track will be of equal value. And of course the terminals, depots, shops and yards will directly produce either no earnings whatever, or will produce only relatively small earnings. The system rests upon the theory that each railway company in the state will have and own in connection with its lines within the state appropriate terminals, depots, office buildings, shops and like properties and structures which will be commensurate with

the business done in the state, and that the prescribed percentage of gross earnings will produce a tax equivalent to that which would result from a valuation and levy on the *ad valorem* basis. All of such properties, as well as trackage, are relieved of any other taxation whatever upon the payment of the amount assessed.

State vs. Northern Pacific Ry. Co., 139 Minn. 473, 475.
State vs. Wells Fargo Co., 146 Minn. 444, 453.
State vs. The Pullman Co., 146 Minn. 458.
United States Express Co. vs. Minnesota, 223 U. S. 335.
Cudahy Packing Co. vs. Minnesota, 246 U. S. 450.

The property of the company in the state, and all of it, is the subject of the tax. There is in effect a legislative assessment of taxes resting upon the legislative determination that a tax so computed will impose only a fair burden upon the property of the company. Such a tax must stand or fall as a single assessment. Here the attack is made upon only a part of the tax, upon the accidental circumstance that something less than the whole tax is involved in the judgment appealed. It is true that the court can declare this supplementary sum, which the law says should have been included in the single assessment provided for, to be uncollectible, but a decision to that effect must rest upon the ground that our gross earnings statute as interpreted and applied in this case is invalid in its entirety. Obviously, if the statute can not be applied to earnings arising out of the hauling of iron ore, and if there is no valid law as to that much of the company's property, there is no law applying a tax to any part of its property.

Meyers vs. Wells-Fargo, 223 U. S. 298.

We must consider, therefore, whether the gross earnings

law, as applied to the whole of the company's property in the state, was and is invalid upon the showing here presented.

II.

The Findings of the State Court Dispose of Appellant's Contention that "Wisconsin Dock Revenue" Could not Be Taken into Account in Arriving at Minnesota Earnings.

If the true position of appellant is that the statute is invalid only in its application to "the Wisconsin dock revenue" it is wholly disposed of by the findings of fact. There was no dock revenue, and there was no such application of the statute. The alleged dock revenue consisted merely of an allocation by the Great Northern Company of parts of its earnings to a corporation which it owned, controlled and directed, and which it brought into existence for that purpose.

Aside from the creation and dissolution of corporations for this purpose and the making and changing and abandoning of fictitious agreements, the claim that any dock revenue was included in the calculation of gross earnings in this case must rest upon the fact that a separate service, other than a transportation service, was performed at the Allouez dock for which a charge might have been made. Perhaps it must rest upon the fact that a separate charge for that specific service was in fact made at rates fixed by published tariffs. But the findings are that there was no such separate service, and that no separate charge was actually made against shippers for any separate service.

Do the facts, notwithstanding the findings, require a determination that such separate services were performed or

charged for at the docks? And, if so, what were the earnings or charges for such services? In view of the findings we even doubt the propriety of discussing such a question. Our comment will be brief.

At every railway terminal or transfer point there must be facilities for unloading or loading and otherwise caring for passengers and freight. Such terminals are incidental to and a necessary part of all forms of transportation. When, therefore, it is said that switching and sorting was necessary at the docks, no more is said than that switching and sorting is necessary at every terminal. When it is said that ore in the early spring and late fall sometimes freezes, no more is said than that railways must always, both in transit and at terminals, protect commodities and passengers against the elements, except that as to iron ore only an insignificant part of it must be so protected. When it is said that ore sometimes sticks in the cars and must be worked loose by the use of long poles, or that it sometimes must be stored, no more is indicated than that freight must be unloaded and stored and that passengers must be cared for. When it is said the ore must be sorted into grades, deposited in special bins and so mixed, the declaration is no more than that cars always must be switched and sorted so as to carry out the consignor's directions. In a word, the record simply is that there was a terminal service appropriate to the unloading of ore and that unloading was provided for in the most efficient and economical manner, probably at less cost per ton than any other commodity, possibly at less cost than unloading passengers at passenger depots. The service performed at the ore docks was no more local in character and no more separable in nature than were the services at the coal or merchandise docks or the freight or passenger terminals of

the company constituting the Superior terminal. And these, if we understand appellant's position, are conceded to involve no service separable from the line haul.

If the conclusion were otherwise, the query would arise: what was the value per ton of the special or local service? Appellant says, of course, it was of the value per ton which it deducted over the period covered by this record. That is, until June 1, 1903, the service of hauling from Saunders, switching, sorting and the dock service was worth twenty-five cents per ton. Until December 1, 1908, although the Great Northern Company acquired the tracks and yards east of Saunders under lease, and only the dock service remained, it continued to be worth twenty-five cents per ton. After August 1, 1909, it was worth twenty-two cents per ton. During 1912 it was worth fifteen cents per ton. The charge for the haul from the mines, including delivery on the boats was, until December 26, 1911, eighty cents per ton, and thereafter sixty cents per ton. Appellant produced in evidence a tariff of the Director General of Railroads for the Duluth, Missabe & Northern in conjunction with the Great Northern Company, as of January 18, 1919, when there was special occasion to move a quantity of ore over the Duluth, Missabe & Northern by way of Allouez docks, fixing a charge for dock service at five cents per ton. In the years 1901 to 1912 there was, by these allowances, attributed to dock service the sum of $16,491,359.43 (R. 3), resulting in dividends amounting to $11,430,000 (R. 102)—this as compensation for the use of property in which the original investment was $760,000, and which in 1912 was carried at the book value of $5,294,137. Considering that these docks existed and were owned and controlled by the Great Northern Company before the Dock Company ever came

into existence, and considering the seemingly arbitrary nature of the allotments, and their excessiveness in comparison with the Great Northern investment in the dock, it must be concluded that the record gives no warrant whatever for accepting the value put upon the dock service by the company, and, more, affords no basis whatever for assigning any separate value. Appellant's case falls, therefore, on the findings and on the facts.

III.

THE INCIDENTAL SHOWING OF COMPARATIVE ORE LINE INVESTMENT IN MINNESOTA AND IN WISCONSIN SERVES NEITHER TO REFLECT VALUES NOR TO AFFECT THE VALIDITY OF A TAX COMPUTED ON THE GROSS EARNINGS BASIS.

The company showed the cost of the rails and docks for 1908 and subsequent years. The investment in Wisconsin was greater per mile of track than in Minnesota. This showing was not made in support of the contention now made. There was no attempt to show the value, except as reflected in cost, either of the Minnesota property or of the dock. There was no issue as to value. Only costs for a portion of the period here involved were presented. There was no finding in the state court as to value and no finding was sought. The comment of this court in *Casey vs. United States*, 275 U. S. 413, 416, is pertinent:

> "A court * * * rarely can be justified in giving judgment upon grounds that the record was not intended to present."

Is there warrant for now holding, on this meager evidence, that in effect the gross earnings system of taxation, with its mileage apportionment, operates to tax property outside of

Minnesota? Certainly there is no direct taxation of outside property. There is no direct valuation of property for purposes of taxation either within or without the state. The theory, of course, is that gross earnings measure value and that apportionment on that basis is the equivalent of apportioning appraised values. But obviously, while it is true that ordinarily gross earnings reflect values there is no exact correspondence. Even less need there be any correspondence between earnings and value on only part of the system. And it is even clearer that mere proof as to cost or investment of the different parts of a railway line do not show the value of each specific component. Proof that gross earnings and costs do not correspond falls far short of showing that gross earnings do not truly reflect values. It tends rather to show that costs do not accurately reflect values.

The contention deals only with a portion of the company's lines in Minnesota, a relatively small portion considering the whole mileage within the state—87 miles out of about 2,000 miles. On the other hand, it involves a relatively large part of the earnings. No facts are furnished to show whether the investment in the 87 miles of trackage was a relatively large or relatively small portion of the company's investment in the whole state, but it fairly may be inferred that investments of the company in this trackage was approximately in proportion to total mileage within the state, hence relatively small.

There is no evidence whatever as to relative costs for years prior to 1908. There is evidence that at the beginning the cost of the dock was $760,000; that the investment in it increased yearly until 1908, but there is no evidence as to the original investment in the Minnesota portion of the line, or as to whether there were important variations prior

to 1908. There can be no just inference on the record as it stands that the relative distribution of costs was the same before 1908 as afterward.

And there is evidence in the record indicating that values in Minnesota have no relation, or very little relation, to cost. The calculation may be made, and is made, in appellant's brief showing that Minnesota's 87 miles of line over which ore is hauled furnishes about one-fourth of all earnings within the state over the more than 2,000 miles of system there. It is fairly to be inferred that this particular trackage is much more valuable per mile than any other property within the state, and immeasurably more valuable than cost. And the record definitely shows that allotting to the dock at Allouez the portion of earnings which appellant claims it was entitled to on the basis of cost apportionment gave to the dock property a value greatly in excess of cost.

The great difference between earnings over the ore trackage and earnings over remaining mileage in Minnesota, with no indication of like differences in investment costs, suggests the danger of trying to determine relative values of different portions of the interstate ore line on the cost basis rather than on the mileage basis. And that difference suggests the danger of considering the validity of an important, long established and satisfactory taxing system in the absence of complete data.

If this line is to be considered as something separate and apart from the company's system in Minnesota, it should be treated as one furnishing a continuous indivisible service between the mines and the boats resulting in earnings having no relation to the cost of any particular portion of the whole. If a separation of values at the state line must be made, and if the value comes from the existence of an ex-

traordinary amount of profitable traffic, the fairer basis of separation will deal with the traffic or the earnings, not with cost factors which are not here an important element in making value. So divided, almost the whole value of the line lies in Minnesota. The traffic is wholly attributable to Minnesota. Its source is there and the control of it is there. When the Minnesota trackage and the Wisconsin trackage and the docks were separate, the Wisconsin portion of the property had no value above cost. The Minnesota line was part of a complete system reaching the mines and entering Duluth and Superior, and slight as it is, there is enough in the record concerning the issuance of certificates of beneficial interest in ore lands to Great Northern stockholders in 1896 to indicate that the Great Northern Company controlled the traffic through ownership of iron mines. At Duluth or Superior, it could lease, buy, or build docks. It could negotiate for a division of earnings with the independent owners of the Wisconsin trackage and the docks. Whichever it did would necessarily be on the basis of cost of that trackage and docks, since it would not lease or buy or divide earnings on a basis higher than cost of building on its own account.

If we were here considering a direct valuation, as by the appraisement of an assessing officer or body, it would be quite apparent that an apportionment on the mileage basis of the whole value of this line, rather than on a cost basis, could not be set aside if it attributed to the Minnesota mileage the whole or principal earnings value of the ore line, leaving to Wisconsin cost value for a dock and adjacent trackage such as we have here. Having in mind the source and nature and value of the whole traffic, a division of the unit on the mileage basis will not be, to say the least, manifestly unfair or

arbitrary, and will not actually, and certainly not demonstrably, include in the Minnesota valuation elements which do not belong there.

Plainly there is an extraordinary use value in this line. If all of that use value be attributed to Minnesota as the source of the traffic, the mileage pro rate of earnings will give to the state less than what belongs there. Even if the use value be spread over the whole mileage, it will give to the whole line a very different and much larger value than appellant assigns to the different parts. Given its true value, allowing the distribution of costs as claimed, distributing the investment in equipment over the length of the ore line, and spreading the use value over mileage, Minnesota would be entitled to approximately the mileage apportionment which the law prescribes. As to what would be a fair distribution of the true value of this line there is no evidence. It is quite clear, therefore, that there can be no sound determination of this case on the assumption that values in Minnesota and values in Wisconsin are equal to costs.

But the ultimate question is not and can not be the existence or lack of existence of a value upon which the tax is calculated. We do not ascertain the value of the whole property of the company over its entire system and take a part of it for Minnesota. Neither do we ascertain earnings over the whole system and take a part for Minnesota. The measure of the tax is earnings within Minnesota only. If charges for railway service were fixed according to state lines, there would be no question for decision here. But since they are made between points within the state and points elsewhere, without separation at the state line, provision for some form of apportionment is necessary if the state is to keep within its borders. Seemingly there can be

no other basis and no fairer basis of apportionment than that of mileage for each separate earning. Furthermore, it would be utterly impractical to attempt to devise and to apply with equality any other basis of separation. At any rate, the use of the mileage apportionment of earnings does not, as does the mileage apportionment of ascertained values, directly tax or affect property outside the state. It is in purpose at least a method of keeping within the state; and until there is demonstration that the earnings do not correspond with mileage there can be no valid ground for the contention that property outside the state is taxed. There is no such demonstration in this regard.

At bottom appellant's case must rest upon the assumption that earnings vary with costs of construction over the railway line, or at least over that part of it over which any particular traffic moves. But the truth of that assertion is not self-evident and we are furnished with no facts tending to show its validity. On the contrary, the proof is that there was no separation of earnings on the cost basis or on the service basis, and no showing was made which justified or required any separation on either such basis. There was an indivisible service for a single charge; and even if the proof justified a belief as to this part of the company's line for these years that a cost basis of separation would have been preferable to the mileage basis, nevertheless it would have to be recognized that the federal constitution does not require the adoption of only perfect taxing systems. It does not require that the best of several fair or practical systems shall be selected. So far as here involved, it forbids the use of a system which operates to tax property beyond the jurisdiction of the state or which discriminates against interstate commerce.

In *Western Union Telegraph Co. vs. Taggart*, 163 U. S. 1, 28, this court said:

"Moreover, the cost of the property, or of its replacement, is by no means a true measure of its value."

In *Western Union Telegraph Co. vs. Massachusetts*, 125 U. S. 530, 552, it said:

"* * * Since the corporation was only taxed for that proportion of its share of capital stock which was supposed to be taxable in that state on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the state, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other state, and since the principle is one which we can not pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

"It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion

of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation."

Other pertinent cases are:

The Delaware Railroad Tax, 85 U. S. (18 Wall.) 230.

Coulter vs. Louisville & Nashville R. R. Co., 196 U. S. 559.

Michigan Central Ry. Co. vs. Powers, 201 U. S. 245, 292.

Illinois Central Ry. Co. vs. Greene, 244 U. S. 555, 561.

Union Tank Line Co. vs. Wright, 249 U. S. 275, 282.

Bass Ratcliff & Gretton vs. State Tax Commission, 266 U. S. 271.

Here we have a substitute system of taxation whereby a fixed percentage of gross receipts ascertained by a method that is not arbitrary is taken to be the equivalent of a fair tax on all of the property of the company within the state. Whether the result is a fair tax can not be determined by any consideration of investments alone in any particular part of the company's property in the state or without the state, or of investments in the whole of the company's property. If the rate applied to earnings were the same as the rate applied to property generally in the state, then the law

could be tested by a consideration of earnings as compared with values within the state, because then the equality of its operation would rest upon the theory that earnings and values would exactly correspond. But the very fact that the gross earnings rate is a fixed rate necessarily varying from the general property rate indicates the belief and demonstrates the underlying theory of the law that while earnings reflect value there is no exact correspondence, and this fact indicates as well that only by separation of the two factors, to-wit, earnings calculated as the statute requires them to be calculated, and the rate, which in combination were intended to produce a fair tax, can there be any ascertainment of whether or not property outside the state has been taxed or whether commerce has been unduly burdened. The gross earnings system of taxation has been held by this court to involve no violation of any provision of the federal constitution. This method of arriving at a tax, which seemingly is arbitrary and not comparable with taxation in its ordinary form, this court has held, will not be overthrown until there is proof that the resulting tax by reason of excessiveness burdens commerce or reaches values beyond the the state's taxing power. If it be true that it will burden commerce only when excessive as compared with ordinary taxation, it must likewise be true that it will reach property beyond the state's jurisdiction only when it is in excess of what might properly have been charged against property of the company within the state. The first of these propositions is settled in the cases which we are about to cite. We submit that the second of the propositions follows from the nature of the legislation and is well within the reasoning of these cases.

This court, in *Pullman Co. vs. Richardson*, 261 U. S. 338,

in upholding a California gross earnings law modelled after the Minnesota law as applied to sleeping car companies, said:

> "In taxing property so situated and used a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce. *Cudahy Packing Co. vs. Minnesota, supra; St. Louis Southwestern Railway Co. vs. Arkansas*, 235 U. S. 350, 367; *United States Express Co. vs. Minnesota, supra; Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas, supra*, p. 227; *Union Tank Line Co. vs. Wright, supra.*
>
> "An examination of the tax in question in the light of these principles shows that the chief objection urged against it is not tenable. The provisions under which the tax is imposed call it a property tax, specify the property subjected to it and declare that it is in lieu of all other taxes on such property. The Supreme Court of the state holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this court as a property tax in *United States Express Co. vs. Minnesota* and *Cudahy Packing Co. vs. Minnesota*, above cited. True, it is computed with special regard to the gross receipts, but this, as is fairly shown, is done merely as a means of getting at

the full value of the property, considering its nature and use. The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern, nor to be relatively higher than the taxes on other kinds of property. There is no ground for thinking that it operates as a discrimination against interstate commerce."

In *Cudahy Packing Co. vs. Minnesota*, 246 U. S. 450, this court in upholding the Minnesota law providing for the taxation of freight line companies, which law is substantially the same as that applicable to railroads, said (p. 453):

"* * * On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack' as restraining or burdening such commerce. *St. Louis Southwestern Ry. Co. vs. Arkansas*, 235 U. S. 350, 367; *Postal Telegraph Co. vs. Adams*, 155 U. S. 688; *Wisconsin & Michigan Ry. Co. vs. Powers*, 191 U. S. 379, 387; *Fargo vs. Hart*, 193 U. S. 490, 499; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, *supra*."

And again (p. 455):

"Because the usual tax rate, if applied to the cash

value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax on the property. But the contention proceeds on an erroneous assumption. The state is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value."

In *United States Express Co. vs. Minnesota*, 223 U. S. 335, this court sustained the Minnesota law providing for taxing express companies by the gross earnings method. The law there considered did not provide for a mileage apportionment of interstate earnings, but it was treated as not being distinguishable on that account from laws containing provisions for apportionment. After quoting from an earlier decision as follows (p. 345):

> "'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution.'"

It concluded (p. 348):

> "There is no suggestion in the present record, as shown

in *Fargo vs. Hart*, 193 U. S. 490, that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made."

We submit that these cases mean that before a gross earnings tax law will be overthrown there must be proof that the resulting tax is excessive as compared with taxes imposed upon other property within the state. And we submit, too, that such a test is a simple and practical one.

In the case at bar no effort was made to show that the tax was in excess of an ordinary tax upon the property of the company within the state, nor in excess of an ordinary tax upon the ore-carrying line. We have evidence of the cost of the Minnesota line. Gross earnings taxes charged against it may be calculated upon the allocations made to the dock company and their relationship to the whole earning. The published reports of the Minnesota Tax Commission give the ordinary tax rate—the general property rate—for the years covered in the record. In this way we are able to make substantially accurate calculations as to the taxes which would have been assessed against the ore line on the general property tax basis applied only to costs. The reports of the Tax Commission show the average tax rates for the whole state and for the counties through which the ore line runs. The St. Louis county rate is much lower than the average for the state or for Itasca county. Taking that rate and applying it to the cost of the Minnesota trackage and the Minnesota proportion of the cost of equipment, and ignoring thereby its use value, we are able to show that the resulting tax would have been very much lower than is the tax which has been assessed under the gross earnings law which the company attacks here.

These calculations indicate that gross earnings taxes, with their mileage apportionment, were very much lower than what would have been legitimate as ordinary taxes on the company's property. Incidentally they indicate why the attack here concedes the validity of the gross earnings system except so far as these particular omitted assessments are concerned. They are as follows:

	1908	1909	1910	1911	1912
Value of Trackage in Minnesota	$ 8,982,903	$ 9,012,206	$10,365,297	$10,739,828	$10,878,951
Value of all Equipment	5,705,042	5,701,088	6,726,037	7,217,214	7,178,051
81.55% of Equipment (Minnesota)	4,652,462	4,649,237	5,485,083	5,885,638	5,853,701
Total Value of Trackage and proportion of Equipment in Minnesota	$13,635,365	$13,661,443	$15,850,380	$16,625,466	$16,732,652
	T. C. Rep. 1910 Page 413	T. C. Rep. 1910 Page 425	T. C. Rep. 1912 Page 717	T. C. Rep. 1912 Page 729	T. C. Rep. 1914 Page 343
Tax at average rate St. Louis County	18.59	18.41	21.90	22.28	21.39
Tax on ad valorem basis	$253,481	$251,507	$347,123	$370,415	$357,911
Total Gross Earnings, Ore Haul	$ 2,850,843	$ 5,199,326	$ 6,749,110	$ 7,833,442	$ 8,350,082
Minnesota Share, Gross Earnings, 81.55%	2,324,862	4,240,050	5,503,899	6,388,172	6,809,492
Gross Earnings Tax at 4%	92,994	169,602	220,155	255,526	272,379

COMPARATIVE TAX RATES IN ITASCA AND ST. LOUIS COUNTIES

	Itasca	St. Louis	Average for State
	T. C. Rep. 1910 Page 412	T. C. Rep. 1910 Page 413	T. C. Rep. 1910 Page 414
1908	30.29	18.59	26.98
	T. C. Rep. 1910 Page 424	T. C. Rep. 1910 Page 425	T. C. Rep. 1910 Page 425
1909	33.74	18.41	27.79
	T. C. Rep. 1912 Page 716	T. C. Rep. 1912 Page 717	T. C. Rep. 1912 Page 718
1910	35.72	21.90	27.92
	T. C. Rep. 1912 Page 728	T. C. Rep. 1912 Page 729	T. C. Rep. 1912 Page 729
1911	36.12	22.28	29.67
	T. C. Rep. 1914 Page 342	T. C. Rep. 1914 Page 343	T. C. Rep. 1914 Page 343
1912	35.47	21.39	27.74

Appellant cites several cases as being more in point and urges that they are controlling here. These cases are readily distinguishable.

In *Pittsburgh C. C. & St. L. Ry. Co. vs. Backus*, 154 U. S. 421, 430, the court, speaking of a valuation by a board, where the statute authorized, but did not require, apportionment within the state on a mileage basis, and in reference to a road which might run in two states, said:

> "Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

It added:

> "It is true there may be exceptional cases, and the

testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."

In *Fargo vs. Hart*, 193 U. S. 490, the court held that the valuation of the tangible property of Wells Fargo Company in Indiana as equal to that proportion of the whole property of the company which the tracks in Indiana, over which the company did business, bore to the trackage over which the company did business everywhere, where the whole property of the company included $15,500,000.00 of bonds not used in its express business, and which resulted in valuing the property in Indiana, tangibly worth about $28,000.00, at more than $800,000.00, operated to tax the company on property not within the state. Among other things the court said:

"But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside the state under a pretense."

In *Wallace vs. Hines*, 253 U. S. 66, the court held that a special excise tax upon doing business in the state at a rate of 50c for each $1,000.00 of capital, which, as applied to railroads, was calculated by taking such proportion of all of the stocks and bonds of the company as the main line

trackage in North Dakota bore to the main line trackage everywhere, operated to tax property beyond the state, where it was admitted, by demurrer, that there were included in the valuation of the whole property items of enormous value such as land grants, which added nothing to the value of the road within the state. The court said, too, that North Dakota was a state of plains. It was mainly agricultural. Its markets and the distributing centers from which it purchased were outside, and it naturally followed that the great and very valuable terminals of the roads were in other states. These things, the court said, made plain the injustice of assuming the value of the property or business of the companies to be evenly distributed over their trackage.

In *Southern Railway Company vs. Kentucky*, 274 U. S. 76, the court held invalid a Kentucky statute which sought to impose an annual franchise tax, in addition to other taxes on the property of railway companies, calculated by capitalizing the earnings of the company over its whole system and assigning to Kentucky its mileage proportion of such earnings. The proof was that the Southern Railway Company was taxed in Kentucky on account of a subsidiary there, which subsidiary was by the mileage prorate system assigned earnings of $3,642 per mile for 1917, and $3,623 per mile for 1918, when in fact its real earnings were $878 per mile in 1917, and for 1918 there was a loss of $4,741 per mile. The court at one point (p. 577) said:

> "The mere statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it can not be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the state."

None of these cases involves taxation by the gross earnings method. Only one of them involves an apportionment of earnings (net earnings), and the apportionment was made for the purpose of arriving directly at a valuation by the capitalization earnings method. All of them involve directly a determination of values. Furthermore, all determine value by appraising property of the whole system. Hence, there is a determination of values outside of the state and a direct taxing of that value. If the method of selecting the state's portion of the whole value of the system be such as to bring within the state a greater part of the value of the system than it actually has, there is directly and incontestably a taxation of property beyond the state's borders. The ultimate question under such general property tax systems is whether the company's property within the state has been fairly valued. Whether a track mileage apportionment of values will be fair is necessarily a question of fact in exactly the same degree as is the question of value itself. In the rulings under consideration, therefore, this court had to consider whether or not as a matter of fact a track mileage apportionment brought into the state a greater part of the value of the whole property than actually existed within the state. In some of the cases proof was clear and complete that no such value as was taxed by the state was within its borders. In one the evidence was not such as to satisfy the court that the board's valuation was arrived at by a track mileage apportionment which would have resulted in overvaluation under the circumstances. Such cases can have no bearing in considering the validity of the gross earnings tax where neither valuation nor ordinary tax rates are used in computing the tax.

IV.

Appellant's Supposititious Cases do not Demonstrate Invalidity of Tax.

a. *A two-mile tunnel in Wisconsin.*

Appellant suggests a number of different situations which, in its opinion, might exist and would be similar to that here presented and respecting which the law, if applied, would clearly be invalid. We conceive that such conditions could exist. But these suppositions demonstrate only that a gross earnings system of taxation can not be tested by rules or principles applicable to an *ad valorem* system. They do not demonstrate that a prescribed percentage of earnings over the whole system, or a part of the system, will exceed a fair tax upon the property of the system or upon any part of it. More important, they do not demonstrate that the system, regardless of the apportionment factor, operates to tax property outside of the state. One such assumption is that this ore might have been hauled through a very expensive tunnel to a destination only two miles beyond the state line with the result that Minnesota would collect a tax on, for instance, 98% of the earnings, while fifty or sixty per cent of the investment might be in Wisconsin. We answer that if only two miles of trackage remained in Wisconsin with no tunnel, Minnesota would collect the same tax although 98% of the value might be in Minnesota and 2% of it in Wisconsin. The effect would be that Minnesota, in either event, would tax property within the state of precisely the same nature and of precisely the same value in precisely the same amount. If the tax in the latter case were not invalid and did not reach property without the state, the same tax on

the same property in appellant's supposed situation would have no better basis for attack.

b. *An independent dock company.*

Appellant suggests again that if the Dock Company had been an entirely independent company receiving as its division of the entire charge the amount alleged here to have been paid by the Great Northern Company, the state could not include in its calculation any portion of its payments to the Dock Company. We offer instead a supposition nearer plausibility. If the Great Northern Company had connected with an independent carrier at the state line, which carrier owned the Wisconsin trackage and the docks, and if it divided earnings with that carrier on a basis which it fairly would have had to accord, Minnesota would probably collect on more than 81.55% of the whole ore charge and there would be no complaint of taxing property outside of the state.

c. *If the company had taken a lease of the dock.*

A further variation in the situation suggested by appellant is that if at Allouez Bay the Great Northern instead of owning the dock had taken a lease at an annual rental, its taxes would have been the same as now charged. But its disproportionate investment argument would be wholly unavailable under such circumstances. And if the company had leased a similar dock at Duluth, paying an annual rental, its Minnesota investment would have been smaller, its taxes would have been larger, and there would have been no Wisconsin property to be considered.

d. *The comparison between the Great Northern and a company using but not owning a dock in Wisconsin.*

Even more significant is the suggestion, in effect, that a line competing with the Great Northern might make arrangements for the use of a dock in Wisconsin. If the two companies operated on equal terms and for equal distances in Minnesota, their investments would vary greatly, because one owned a dock and the other did not, yet each would pay the same tax. This, we think, clearly demonstrates that the system does not reach or tax the dock since it imposes upon the Minnesota property of each company precisely the same tax. And we suggest that if a competing line acquired from the Great Northern the right to use the Allouez Bay dock and had equal traffic under the same circumstances with the Great Northern, only one-half of the dock investment would be chargeable against the earnings of each company, because "investment per car handled" (Appellant's Brief, p. 48) would be the basis of comparing investments, and the disproportionate investment as between the Minnesota mileage and Wisconsin mileage, including the dock, would wholly disappear.

In *State ex. St. Paul, Minneapolis & Manitoba Railway Co.*, 30 Minn. 311, 313, the question was whether or not rentals received by defendant, under an agreement permitting another railway company to operate over defendant's lines, might be included in gross earnings for the purpose of taxation, and the ruling was that they should not be so included, the court saying that "exacting 3 per centum upon the rent paid by the company, and upon receipts by the tenant earned by operating the railway, would be, to the extent of the rent, in the nature of double taxation, or rather

of exacting twice the commutation for taxes on the same property." There, assuming traffic to be equal, each paid the same tax, although one owned a railway line and the other did not.

The conclusion, it seems to us, must be that either the gross earnings system of taxation, with its mileage apportionment, is wholly arbitrary and intrinsically invalid on the ground alone that it uses earnings as a measure of the tax, and in that respect the mileage apportionment would be without substantial bearing; or that it is valid as a substituted method of taxing the property within the state, if not in excess of what might be assessed by ordinary methods; and the existence or non-existence, the value or lack of value, of property in Wisconsin, or in any other place outside of Minnesota, has nothing to do with the question.

V.

Other Local Charges Credited 100% to Minnesota Are Not Part of the Transportation Movement.

The argument is made, too, that the state includes in its calculation of earnings, without apportionment as to mileage, certain service charges, such as demurrage, switching and storage, even though performed in respect of shipments from outside the state, and that it excludes such charges arising without the state, even though connected with shipments originating in Minnesota. The claim is that services performed at Allouez Bay were of that character. Such earnings, in their very nature, are purely local. Switching and storage when not purely local are covered by the line haul tariff. If additional switching or storage, not contemplated in the car movement, is done, separate local

charges are made for that purely local service. Demurrage is obviously an earning growing out of a use of property which begins and ends when and where the delay occurs, and is not covered by the transportation charge. Switching, storage and demurrage are in no sense part of the transportation movement, but constitute a separate local service performed for the convenience of the consignee after the transportation movement has ended. What was done at Allouez Bay was covered by the charge for hauling ore; it was contemplated at the beginning of the movement and was necessary always to its completion. If the company had stored ore beyond the period allowed, or had done switching of an unusual or extraordinary nature in Wisconsin in respect of particular ore cars, or if through the fault of the shipper ore cars were held to the point of delay, resulting in extra charges, no part of the charges made therefor would have been included in the computation of the Minnesota tax. This argument ignores the facts.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 106 and 107.—October Term, 1928.

106	Great Northern Railway Company, Plaintiff in Error, vs. The State of Minnesota.	In Error to and Appeal from the Supreme Court of the State of Minnesota.
107	Great Northern Railway Company, Appellant, vs. The State of Minnesota.	

[February 18, 1929.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case is here both by writ of error and appeal. Appeal being the proper method, the writ of error (No. 106) will be dismissed.

The action was brought by the state to recover taxes for the years 1901 to 1912, inclusive. Judgment against the company was rendered by the trial court for the years 1903 to 1912, no recovery being allowed for 1901 or 1902. Upon appeal the state supreme court affirmed the judgment. 160 Minn. 515. A writ of error from this Court was dismissed for want of jurisdiction resulting from an insufficient setting forth and waiver of claim of a substantial federal constitutional question. 273 U. S. 658. Thereafter, the state supreme court vacated its judgment, granted a reargument upon the constitutional question, and again affirmed the trial court. 174 Minn. 3. The present appeal is from the judgment of the court below last described.

In Minnesota, by statute amended from time to time but substantially in effect since 1871 (see 1 Mason's Minnesota Statutes, 1927, §§ 2246, 2247), a tax, measured by gross earnings, is laid upon all railway companies, in lieu of all taxes upon all of their property within the state. As a basis for computing the tax, each railway company is required to report annually its gross earnings

upon business done upon its lines wholly within the state and upon interstate business in the proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done. The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state. The state supreme court has so held. And to the same effect see *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 452.

The attack upon the statute is not that it is bad upon its face, but that, as applied to the specific facts upon which the liability of the company in the present action was sustained, it imposes a tax in respect of earnings wholly referable to certain docks in Wisconsin and a short stretch of track immediately connected therewith, and, therefore, results in laying a tax upon property outside the State of Minnesota. The contention is that the statute as thus construed and applied constitutes a burden upon interstate commerce and also violates the due process of law and equal protection of the laws clauses of the Fourteenth Amendment. The facts follow.

Among the lines owned and operated by the railway company, directly or through its subsidiaries, amounting in all to more than 2,000 miles within the state, is a road 107 miles in length running from the Mesaba Iron Range in Minnesota to, and including as part thereof, the Wisconsin docks. Eighty-seven miles of the road are in Minnesota, and 20 miles including the docks are in Wisconsin. The principal business of the road is that of hauling ore from the mines at Mesaba to the docks. For this service the tariff provides a single charge per ton of ore transported, in which the dock service is absorbed without being separately specified. For the years in question, the railway company, in reporting the gross earnings assignable to the Minnesota part of the line as proportioned to the foregoing division of the mileage, first allocated to the docks and deducted, as compensation for dock services, amounts ranging from 15 to 25 cents per ton of ore hauled. This was done upon the theory that in calculating the gross earnings the portions of the line in the two states should be considered entirely apart from the docks, and that the amounts thus allocated and deducted constituted earnings fairly attributable to the docks and the immediately connecting track alone. Taxes were computed and paid

accordingly. Subsequently, the facts being disclosed, the state brought this action for additional taxes calculated upon the amounts thus allocated and deducted.

The constitutional contention was not pressed in the trial court. No finding pertinent to that inquiry was either asked or made. The question was raised by the answer, but waived in both courts below; and we so held. But for the action of the state supreme court in granting a reargument, it would not be here now. We agree with that court that it fairly cannot be found from the evidence that the mileage value of the Wisconsin part of the line, including the docks, was in fact greater than the Minnesota part of the line. The record contains some statements in respect of the cost of the docks and in respect of expenditures in road construction, but the showing is incomplete and leaves even the question of cost in large degree a subject for conjecture.

The evidence does not show the actual use value of either the Minnesota or the Wisconsin part of the road, or their relative values. If all the facts bearing upon the matter were revealed, they well might demonstrate not only that cost, even if proved, would not be a fair measure of the use value, but that the Minnesota part of the line, mile for mile, was equal in value to that of the Wisconsin portion with the docks included. Such evidence as the record contains tends to that conclusion rather than the contrary. The road, including the docks, is a unit. The charge for transportation of ore, including dock services, is a single charge. The entire ore traffic originates and seems to be controlled in Minnesota; and the earnings from that source comparatively are very great, suggesting at least the probability of a special use value of the Minnesota part of the line. It is competent for the state to impose a tax upon the property of the company within the state and for that purpose to measure the value of such property in the way here provided. We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds "what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property." *Pullman Co.* v. *Richardson*, 261 U. S. 330, 339.

Under these circumstances, upon principles established by numerous decisions of this Court, the tax is not open to challenge as an exaction in violation of the federal Constitution. *Pullman Co.* v. *Richardson*, *supra*, pp. 338-339; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 345; *Cudahy Packing Co.* v. *Minnesota*, *supra*, pp. 453-455, and cases cited.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.